

1979

Wrongful Conception [Sherlock v. Stillwater Clinic, 261 N.W.2d 69 (Minn. 1977)]

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Recommended Citation

(1979) "Wrongful Conception [Sherlock v. Stillwater Clinic, 261 N.W.2d 69 (Minn. 1977)]," *William Mitchell Law Review*: Vol. 5: Iss. 2, Article 5.

Available at: <http://open.mitchellhamline.edu/wmlr/vol5/iss2/5>

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WRONGFUL CONCEPTION

[*Sherlock v. Stillwater Clinic*,
260 N.W.2d 169 (Minn. 1977)].

I. INTRODUCTION: THE *Sherlock* DECISION

The view that a married couple may suffer an injury upon becoming parents is of recent origin. During the past several years, cases have arisen in which parents of unplanned children¹ have sued physicians who performed an unsuccessful sterilization on one of the spouses.² Rejecting the ancient adage that the birth of a child is always a blessing,³ courts have imposed liability on the negligent doctor for all the damages resulting from the doctor's lack of care, including damages for the costs of rearing the unplanned child.⁴ Acknowledging current attitudes to-

1. The term "unplanned child" will be used throughout this Comment to describe the infant born to parents who have attempted to prevent its conception. As the court commented in *Jackson v. Anderson*, 230 So. 2d 503, 503 (Fla. Dist. Ct. App. 1970): "This child is not to be thought of as unwanted or unloved, but as unplanned."

2. See, e.g., *Bishop v. Byrne*, 265 F. Supp. 460, 463 (S.D.W. Va. 1967) (applying West Virginia law) (recognizing claim based on negligent sterilization of mother); *Depenbrok v. Kaiser Foundation Health Plan, Inc.*, 79 Cal. App. 3d 167, 169 n.1, 144 Cal. Rptr. 724, 725 n.1 (1978) (recognizing claim based on negligent tubal ligation); *Jackson v. Anderson*, 230 So. 2d 503, 503 (Fla. Dist. Ct. App. 1970) (recognizing claim based on negligent sterilization of mother); *Bushman v. Burnis Clinic Medical Center, P.C.*, 83 Mich. App. 453, 459-60, 268 N.W.2d 683, 685-86 (1978) (recognizing claim based on negligent vasectomy); *Cox v. Stretton*, 77 Misc. 2d 155, 160-61, 352 N.Y.S.2d 834, 841-42 (Sup. Ct. 1974) (recognizing claim based on negligent vasectomy); *Bowman v. Davis*, 48 Ohio St. 2d 41, 46, 356 N.E.2d 496, 499 (1976) (per curiam) (recognizing claim based on negligent tubal ligation); cf. *Troppi v. Scarf*, 31 Mich. App. 240, 254, 187 N.W.2d 511, 517 (recognizing claim based on negligent filling of prescription for birth control pills), *leave to appeal denied*, 385 Mich. 753 (1971).

The current trend of cases can be dated from 1967 when the decision in *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), recognized an action by a woman on whom a tubal ligation had been unsuccessfully performed. See *id.* at 311-16, 59 Cal. Rptr. at 468-71 (finding complaint stated claims for negligence, breach of contract, and misrepresentation). Although a few earlier cases appeared to recognize a claim based on unsuccessful sterilization, see, e.g., *West v. Underwood*, 132 N.J.L. 325, 40 A.2d 610 (1945) (negligent failure to perform sterilization necessitated second operation that led to complications but not pregnancy); *Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964) (affirming verdict for physician who performed vasectomy on man whose wife subsequently gave birth to healthy child on grounds that jury could have concluded that parents suffered no damages and that recanalization was proximate cause of fertility), none has had the impact of the *Custodio* opinion. See Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1411-12 (1977).

3. See *Terrell v. Garcia*, 496 S.W.2d 124, 131 (Tex. Civ. App. 1973) (Cadena, J., dissenting), cert. denied, 415 U.S. 927 (1974); cf. *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977) (Biblical admonition to "be fruitful and multiply" no longer pertinent for many Americans).

4. See, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 324-25, 59 Cal. Rptr. 463, 476-77

ward family planning and contraception, the Minnesota Supreme Court reluctantly⁵ joined the trend toward recognition of the parents' claim in *Sherlock v. Stillwater Clinic*⁶ and coined a new legal phrase to describe the action—wrongful conception.⁷

Sherlock is typical of situations in which the parents' claim for damages has been recognized.⁸ Mr. Sherlock had submitted to a sterilization

(1967); *Troppi v. Scarf*, 31 Mich. App. 240, 252, 187 N.W.2d 511, 520, *leave to appeal denied*, 385 Mich. 753 (1971); *Cox v. Stretton*, 77 Misc. 2d 155, 160-61, 352 N.Y.S.2d 834, 841-42 (Sup. Ct. 1974); *Bowman v. Davis*, 48 Ohio St. 2d 41, 45-46, 356 N.E.2d 496, 498 (1976) (per curiam).

5. The opinion in *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) contains many indications of the court's dissatisfaction with this cause of action. Justice Rogosheske, who authored the opinion, admitted he shared the view that "the birth of a healthy child should always be regarded as a 'gift' of incalculable benefit to his parents." *Id.* at 177 n.15. However, instead of adopting the position of Chief Justice Sheran and Justice Peterson that to award damages for the costs of rearing a child is contrary to public policy, *see id.* at 177 (Sheran, C.J., dissenting), the majority of the court believed it would be "myopic" to hold as a matter of law that the benefits incidental to parenthood outweigh the rearing costs. *Id.* at 175; *see notes 54-56 infra* and accompanying text. As will later be explained, the court's adoption of the incidental benefits rule, which Justice Rogosheske expected would dissuade parents "from regarding that item of damages as the primary and most significant basis for instituting suit," 260 N.W.2d at 177 n.15, may represent a compromise between the two positions, an implicit recognition of the continuing vitality of the dissent's position. *See notes 186-224 infra* and accompanying text.

Other expressions of concern are embodied in the court's admonition to the parents and their attorneys, *see notes 235-37 infra* and accompanying text, and in the court's suggestion to physicians that the adoption of the action may "support the position of those doctors who refuse to perform nontherapeutic sterilizations 'on demand' on the ground that such sterilizations 'frequently constitute a serious abuse of surgical license.'" *Id.* at 175-76 (quoting 2 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* § 19.11 (1977)).

As interesting as these observations may be, they must be understood in the light of the holding in the case. The Justices did not permit their personal attitudes to interfere with their recognition of an action for wrongful conception.

6. 260 N.W.2d 169 (Minn. 1977). Approximately a year earlier, the court had been presented with a case in which the underlying action was a claim for wrongful conception. The parents in *Martineau v. Nelson*, 311 Minn. 92, 247 N.W.2d 409 (1976) had initiated an action in Hennepin County District Court, alleging that their physician's negligence in performing a tubal ligation and in giving incompetent advice following discovery of the failure of the operation had resulted in the birth of an unplanned child. *Id.* at 93-101, 247 N.W.2d at 411-14. The issue on appeal related solely to the sufficiency of the evidence to support a jury verdict apportioning 50% contributory negligence to the parents. *Id.* at 101, 247 N.W.2d at 415. Finding no support for apportioning any negligence to the husband and inadequate evidence for apportioning 50% solely to the wife, the court reversed and remanded for a new trial. *Id.* at 104-06, 247 N.W.2d at 416-17. Because the *Martineau* court did not pass directly on the propriety of the parents' claim and refrained from disposing of the damages issue, *see id.* at 103, n.15, 106 n.18, 247 N.W.2d at 416 n.15, 417 n.18, the *Sherlock* decision was necessary to clarify these crucial points.

7. *See* 260 N.W.2d at 174-75. The court's reasons for adopting this term are explained in notes 80-95 *infra* and accompanying text.

8. *See, e.g., cases cited in note 4 supra.*

to limit the size of his family,⁹ he and his wife having decided that seven children were enough. The physician performed a vasectomy and shortly thereafter informed Mr. Sherlock that the operation had been a success. The Sherlocks resumed sexual relations and discovered that the doctor was wrong: fifteen months after performance of the vasectomy, Mrs. Sherlock gave birth to a normal, healthy child.

The Sherlocks sued the physician for malpractice, claiming damages for medical expenses, loss of consortium, and the costs of rearing their unplanned, eighth child. A jury awarded \$19,000 to the parents and the physician appealed. In the supreme court, the physician lost on the liability issue, but the parents obtained only a hollow victory. Although the court recognized the action for wrongful conception,¹⁰ it ruled that damages should be measured by subtracting the value of the intrinsic benefits of parenthood from the expenses of rearing the unplanned child.¹¹

This Comment will explore the action for wrongful conception, comparing the decision of the Minnesota Supreme Court in the *Sherlock* case with the decisions of other courts that have addressed similar claims. First, the background and rationale behind the action will be examined.¹² An analysis of the nature of the action will follow in which the reasons for adoption of the term "wrongful conception,"¹³ the possible legal bases for a claim,¹⁴ and the limitations period applicable to the action¹⁵ will be discussed. Finally, the measure of damages will be explained,¹⁶ with emphasis upon the application of the incidental benefits rule in the action for wrongful conception.

II. THE BACKGROUND AND RATIONALE BEHIND THE *Sherlock* DECISION

The right of parents to control the size of their families underlies the action for wrongful conception.¹⁷ Absent recognition of this right, the

9. 260 N.W.2d at 171. This type of sterilization is referred to as nontherapeutic. See note 27 *infra* and accompanying text. When, as, for example, in *Martineau v. Nelson*, 311 Minn. 92, 247 N.W.2d 409 (1976), the sterilization is performed to protect the wife's health, it is called therapeutic. See *id.* at 94, 247 N.W.2d at 411 (sterilization recommended because of extreme tension and nervousness during fourth pregnancy).

10. See 260 N.W.2d at 170, 174-75.

11. See *id.* at 170-71, 175-76.

12. See notes 17-79 *infra* and accompanying text.

13. See notes 80-95 *infra* and accompanying text.

14. See notes 96-146 *infra* and accompanying text.

15. See notes 147-66 *infra* and accompanying text.

16. See notes 167-224 *infra* and accompanying text.

17. See, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 317, 59 Cal. Rptr. 463, 472 (1967) (public policy not opposed to sterilization that has as a purpose limiting family size); *Troppi v. Scarfi*, 31 Mich. App. 240, 252-53, 187 N.W.2d 511, 516-17 (family planning statutes evidence policy in favor of limiting family size), *leave to appeal denied*, 385 Mich. 753 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977) ("right to limit procreation is of a constitutional dimension").

action for wrongful conception may never have developed. Despite the constitutional dimension the right has attained,¹⁸ the action for wrongful conception did not originate from the ramifications of constitutional decisions.¹⁹ Rather, the action finds its roots in a 1934 decision of the Minnesota Supreme Court applying common law principles.

In its opinion in *Christensen v. Thornby*,²⁰ the Minnesota Supreme Court held that the performance of a vasectomy upon a man whose wife's health was endangered by childbirth did not violate any policy opposed to birth control.²¹ The *Christensen* court noted that even in states in which statutes had been enacted outlawing sterilization, the operation was not forbidden if medically necessary.²² The husband's

18. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977); *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10 (1978). In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), the Court stated:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential.

Id. at 541.

19. The United States Supreme Court's decisions on birth control may have given an impetus to the action. See, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 317-18, 59 Cal. Rptr. 463, 472-73 (1967) (finding no contravention of public policy; recognizing but not basing decision on constitutional right as enunciated in *Griswold*); *Troppe v. Scarf*, 31 Mich. App. 240, 252-54, 187 N.W.2d 511, 516-17 (public policy not opposed to use of contraceptives; constitutional right cited as basis for alternative holding), *leave to appeal denied*, 385 Mich. 753 (1971). The Supreme Court decisions, however, have not been the focus of the opinions recognizing the action for wrongful conception. See *id.* at 252-53, 187 N.W.2d at 516-17 (state policy of providing contraceptives as part of welfare program and use by millions of Americans demonstrated policy); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977) (change in public policy reason for recognizing action). But see *Rivera v. State*, 94 Misc. 2d 157, 162, 404 N.Y.S.2d 950, 953-54 (Ct. Cl. 1978) (fundamental right to prevent procreation was basis of action), *aff'd mem.*, — A.D.2d —, 414 N.Y.S.2d 949 (1979); *Bowman v. Davis*, 48 Ohio St. 2d 41, 46, 356 N.E.2d 496, 499 (1976) (per curiam) (*Doe v. Bolton*, 410 U.S. 179 (1973), *Griswold*, and *Roe* were foundation for action).

20. 192 Minn. 123, 255 N.W. 620 (1934).

21. See *id.* at 125-26, 255 N.W. at 621-22.

22. See *id.* at 125, 255 N.W. at 621. The court referred to the Minnesota statute requiring the consent of the insane or the mentally retarded to sterilizations performed on them. See *id.* This statute, originally adopted in 1925, see Act of Apr. 8, 1925, ch. 154, 1925 Minn. Laws 140 (repealed in part 1975), with some modifications is still in effect today. See MINN. STAT. § 256.08 (1978) (sterilization of insane); *id.* § 256.09 (physician performing operation not to be held civilly or criminally liable); *id.* § 256.10 (recordkeeping required). The section of the original statute, relating to the sterilization of the mentally retarded,

vasectomy in *Christensen* would have fit this narrow exception.²³ Common law principles, the court continued, did not prohibit vasectomies because the operation did not "render the patient impotent or 'unable to fight for the king' as was the case in mayhem or maiming."²⁴ Consequently, the court was not barred from considering the husband's claim for damages merely because he had consented to be sterilized.²⁵

The *Christensen* court did limit its decision to the facts,²⁶ an indication that the holding may have been otherwise if the sterilization had been nontherapeutic, performed solely to limit the size of the plaintiff's family.²⁷ Roughly twenty years later, in *Shaheen v. Knight*,²⁸ a Pennsylvania court expanded the *Christensen* holding and concluded that a nontherapeutic sterilization was not contrary to public policy.²⁹ The *Shaheen* court explained:

It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in declaring such policy void

It is the faith of some that sterilization is morally wrong whether to keep wife from having children or for any other reason. Many people have no moral compunctions against sterilization. Others are against sterilization, except when a man's life is in danger, when a person is low mentally, when a person is an habitual criminal. There is no virtual unanimity of opinion regarding sterilization.³⁰

In neither *Shaheen* nor *Christensen* did the courts rely upon constitutional principles as a basis for their decision. Common law doctrines, both courts concluded, were not in opposition to voluntary sterilization.³¹ The parents' decision to control the number of offspring they

see Act of Apr. 8, 1925, ch. 154, § 1, 1925 Minn. Laws 140 (repealed 1975), was repealed pursuant to a general modification of the law pertaining to the mentally retarded. See Act of June 2, 1975, ch. 208, 1975 Minn. Laws 612. The consent of the mentally retarded to sterilization, however, is retained under the new law. See MINN. STAT. § 252A.13 (1978). The Minnesota statutory scheme, therefore, has never authorized involuntary sterilization nor expressly prohibited voluntary sterilization.

23. See 192 Minn. at 125, 255 N.W. at 621.

24. *Id.* at 125, 255 N.W. at 622.

25. See *id.* at 125-26, 255 N.W. at 622.

26. See *id.* ("We therefore hold that under the circumstances of this case the contract to perform sterilization was not void as against public policy.").

27. See Comment, *A Constitutional Evaluation of Statutory and Administrative Impediments to Voluntary Sterilization*, 14 J. FAM. L. 67, 67 n.2 (1975); 9 UTAH L. REV. 808, 809 n.2 (1965).

28. 11 Pa. D. & C.2d 41 (1957), noted in 19 U. PITT. L. REV. 802 (1958).

29. See 11 Pa. D. & C.2d at 43-44.

30. *Id.* at 43.

31. See *Christensen v. Thornby*, 192 Minn. at 125-26, 255 N.W. at 621-22; *Shaheen v. Knight*, 41 Pa. D. & C.2d at 43-44. In accord with *Christensen* and *Shaheen* are *Jessin v. County of Shasta*, 274 Cal. App. 2d 737, 748, 79 Cal. Rptr. 359, 366 (1969) (applicability

would produce, therefore, could be regarded as a common law right.³²

Although both the *Christensen* and *Shaheen* courts found no common law objection to an action for damages caused by a negligent sterilization, neither court granted the plaintiffs any relief.³³ The results in both cases were based on public policy that prevented the parents from asserting as an injury the birth of an unplanned child. In the final paragraph of its opinion, the *Christensen* court stated:

The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child. The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation. As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority.³⁴

Implicit in this statement are the propositions that the birth of any child, even an unplanned child, confers a blessing upon the parents and that the common law would not admit that an injury could be sustained as a consequence of the normal incidents of pregnancy and delivery.

The *Shaheen* court seized upon this language in *Christensen* and elevated it to a legal principle. Although finding no "unanimity of opinion" regarding the propriety of sterilization,³⁵ the *Shaheen* court declared that "to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people."³⁶ In effect, the court ruled that the parents could suffer no injury as a matter of law.³⁷

The decisions in *Shaheen* and *Christensen* illustrate the influence public policy has had upon the formulation of the action for wrongful

of *Griswold* to sterilizations need not be considered because public policy does not prevent such operations) and *Jackson v. Anderson*, 230 So. 2d 503, 503 (Fla. Dist. Ct. App. 1970) (contract to perform sterilization not contrary to public policy).

32. *Cf. Jessin v. County of Shasta*, 274 Cal. App. 2d 737, 79 Cal. Rptr. 359 (1969) (court noted *Griswold* but affirmed finding by trial court that voluntary nontherapeutic sterilizations were legal in California in absence of countervailing public policy); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 317, 59 Cal. Rptr. 463, 472 (1967); *Jackson v. Anderson*, 230 So. 2d 503, 503 (Fla. Dist. Ct. App. 1970).

For nonjudicial attitudes on sterilization, see Wolf, *Legal and Psychiatric Aspects of Voluntary Sterilization*, 3 J. FAM. L. 103, 104-18 (1963); Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 422-25 (1965) (doctors' and religious groups' attitudes).

33. See *Christensen v. Thornby*, 192 Minn. at 126, 255 N.W. at 622; *Shaheen v. Knight*, 11 Pa. D. & C.2d at 45-46.

34. 192 Minn. at 126, 255 N.W. at 622.

35. See 11 Pa. D. & C.2d at 43.

36. *Id.* at 45.

37. See *id.* at 45-46. In accord with *Shaheen* is *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

conception. Both courts declined to rule that sterilization contravened public policy, yet neither court was prepared to accept the view that the birth of a normal child causes injury to its parents. The approach suggested in *Christensen* and followed in *Shaheen* still finds adherents today.³⁸ Unlike the reasoning in the *Christensen* and *Shaheen* opinions, which was founded upon unsubstantiated interpretations of public policy, the current rationale advanced in support of the argument that the birth of a normal child is not an injury seeks a legal basis in cases involving the wrongful deaths of minors.³⁹ This rationale is illustrated by a Texas court's decision in *Terrell v. Garcia*.⁴⁰ The *Terrell* court reasoned that to permit recovery of the costs of rearing an unplanned child in an action for wrongful conception would be inconsistent with the decisions in wrongful death cases in which "Texas courts virtually hold as a matter of law that the probable earnings of a normal child during his minority will more than offset the parents' expense of rearing him."⁴¹ The wrongful death decisions, the *Terrell* court indicated, sup-

38. See, e.g., *Coleman v. Garrison*, 349 A.2d 8, 12-14 (Del. 1975); *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973), cert. denied, 415 U.S. 927 (1974); *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 516-17, 219 N.W.2d 242, 244-45 (1974) (case involved negligence in failing to diagnose pregnancy, not sterilization); cf. *Ball v. Mudge*, 64 Wash. 2d 247, 250, 391 P.2d 201, 204 (1964) (jury verdict for physician reasonable as jury could have found parents suffered no damage).

39. See, e.g., *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 177 (Minn. 1977) (Sheran, C.J., dissenting); *Terrell v. Garcia*, 496 S.W.2d 124, 127 (Tex. Civ. App. 1973), cert. denied, 415 U.S. 927 (1974).

Rejection of the parents' claim for damages for the costs of rearing the unplanned child has also been based on the theory that conjectural or speculative damages may not be awarded. See generally Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 11 VAL. L. REV. 127 (1978). In *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975), the court followed this reasoning and commented:

A child is born—how can it be said within the ambit of legal predictability that the monetary cost of that life is worth more than its value? We recognize that a few courts, approaching the problem in clinical terms, have applied a "balancing test" which, presumably, permits a jury to say that a life has been weighed and found wanting and thus the parents have been "damaged." [citations omitted] We respect the efforts of other courts to provide a remedy under the circumstances but it seems to us that that kind of judgment, if appropriate at all in an American court of law, might be applied at the end of a life, after it has been lived and when the facts can be identified. But, in our view, any attempt to apply it at birth can only be an exercise in prophecy, an undertaking not within the specialty of our fact-finders.

Id. at 12 (footnote omitted).

The response to the *Coleman* court's argument, ironically enough, lies in the evaluations made in wrongful death cases. See, e.g., *Troppi v. Scarf*, 31 Mich. App. 240, 262, 187 N.W.2d 511, 521 (measure of damages for loss of child's services and companionship in wrongful death cases refutes argument that damages for birth of unplanned child are impossible to determine), leave to appeal denied, 385 Mich. 753 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977) (same).

40. 496 S.W.2d 124 (Tex. Civ. App. 1973), cert. denied, 415 U.S. 927 (1974).

41. See 496 S.W.2d at 127.

port a public policy that values life above the costs of living.⁴² Because the parents' claim in an action for wrongful conception conflicts with this policy, the *Terrell* court rejected the claim.⁴³

These objections to the parents' claim did not deter the Minnesota court from recognition of the action for wrongful conception. Before advancing its arguments in favor of the action, however, the Minnesota court in *Sherlock* noted that opposition to the action was based on arguments against finding that the birth of an unplanned child resulted in an injury to the parents.⁴⁴ *Christensen*, the *Sherlock* court stated, had settled the question of whether a claim could be based on negligence in performing a sterilization.⁴⁵ Although *Christensen* had been the basis for several decisions finding an award of damages to be contrary to public policy,⁴⁶ the *Sherlock* court read *Christensen* narrowly. Characterizing the final paragraph in *Christensen* as dicta, the *Sherlock* court considered the earlier opinion as support for the parents' claim. "Viewed in its correct posture," the court explained, "the *Christensen* case stands solely for the proposition that a cause of action exists for an improperly performed sterilization."⁴⁷ This interpretation of *Christensen* had implicitly been adopted only a year before *Sherlock* was decided. In *Martineau v. Nelson*,⁴⁸ parents of an unplanned child sued the physician who performed a tubal ligation on the mother. On appeal, the only issue presented related to the sufficiency of the evidence to support a finding that the parents had been fifty-percent causally negligent by failing to prevent conception in light of the doctors' suggestion that the operation had failed.⁴⁹ The court reversed, without indicating that the complaint failed to state a claim upon which relief could be granted⁵⁰ and without discussing the issue of damages.⁵¹ Thus, when *Sherlock* reached the supreme court, the issue of whether the parents could obtain damages for an unplanned child was undecided.

The *Sherlock* court addressed two arguments against awarding damages to parents of unplanned children, rejecting both. First, the court distinguished "wrongful life" claims from the parents' wrongful conception claim on the ground that the parents were seeking compensation

42. See *id.* at 128.

43. See *id.*

44. See 260 N.W.2d at 173.

45. See *id.* at 172.

46. See *id.* at 173.

47. *Id.* at 172.

48. 311 Minn. 92, 247 N.W.2d 409 (1976).

49. See *id.* at 101, 247 N.W.2d at 415.

50. See *id.* at 104-06, 247 N.W.2d at 416-17. The *Sherlock* court explained that "[a]lthough [*Martineau*] was concerned solely with evidentiary considerations, we would not have resolved these questions had we disapproved of the underlying cause of action for medical malpractice." 260 N.W.2d at 172 n.4.

51. See 311 Minn. at 103 n.15, 106 n.18, 247 N.W.2d at 416 n.15, 417 n.18.

not for wrongful life but for the costs of rearing an unexpected infant.⁵² Thus, the rationale in wrongful life cases—that damages were too speculative to permit recovery⁵³—was inapposite. The second argument raised the question of public policy. The court, noting that California⁵⁴ and Michigan⁵⁵ appellate courts had acknowledged that changes in public attitudes toward birth control and family planning have undermined the arguments advanced in *Shaheen* and *Christensen*, found the policy objections to awarding damages for wrongful conception were no longer viable. The court explained:

Although public sentiment may recognize that to the vast majority of parents the long-term and enduring benefits of parenthood outweigh the economic costs of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law. The use of various birth control methods by millions of Americans demonstrates an acceptance of the family-planning concept as an integral aspect of the modern marital relationship, so that today it must be acknowledged that the time-honored command to “be fruitful and multiply” has not only lost contemporary significance to a growing number of potential parents but is contrary to public policies embodied in the statutes encouraging family planning. Recent decisions of the United States Supreme Court, moreover, seem to suggest that the right to limit procreation is of a constitutional dimension.⁵⁶

No longer, the *Sherlock* court intimated, did a “unanimity of opinion” preclude awarding damages to parents of unplanned children.

In addition to the change in public attitude toward birth control, the Minnesota court pointed to several other considerations in support of the action for wrongful conception. Permitting parents to recover the costs of rearing the child would have a deterrent effect upon negligent performance of sterilizations.⁵⁷ Furthermore, the court was reluctant to free physicians from civil liability without “a legislatively granted immunity or declared public policy governing sterilization.”⁵⁸ More curiously, the court viewed the action as a reinforcement of the position of physicians who are morally opposed to sterilization.⁵⁹

The latter two considerations, however, are negligible. Whether legis-

52. See 260 N.W.2d at 172 n.3. In accord with *Sherlock* is *Bowman v. Davis*, 48 Ohio St. 2d 41, 45, 356 N.E.2d 496, 499 (1976) (per curiam).

53. See, e.g., *Gleitman v. Cosgrove*, 49 N.J. 22, 28-29, 227 A.2d 689, 692-93 (1967).

54. See *Custodio v. Bauer*, 251 Cal. App. 2d 303, 317, 59 Cal. Rptr. 463, 472 (1967), cited with approval in *Sherlock v. Stillwater Clinic*, 260 N.W.2d at 173.

55. See *Troppi v. Scarf*, 31 Mich. App. 240, 252-53, 187 N.W.2d 511, 516-17, leave to appeal denied, 385 Mich. 753 (1971), cited with approval in *Sherlock v. Stillwater Clinic*, 260 N.W.2d at 174.

56. 260 N.W.2d at 175 (footnotes omitted).

57. See *id.* at 175.

58. *Id.* at 176.

59. See *id.* at 175-76.

lation declaring a public policy against sterilization is constitutional after *Griswold v. Connecticut*⁶⁰ and *Roe v. Wade*⁶¹ seems doubtful. As an alternative method of birth control, sterilization should be entitled to the same protection from government interference that exists for oral contraceptives and abortion.⁶² Legislation immunizing physicians from civil liability for the consequences of their negligence in performing sterilizations appears to be as constitutionally objectionable as is legislation prohibiting the procedure altogether.⁶³ Legislation that draws a distinction between the types of medical malpractice for which a remedy would be provided also may be unconstitutional as a denial of equal protection.⁶⁴ The *Sherlock* court's suggestion that legislation could be drafted to immunize physicians from liability in the wrongful conception context therefore can be discounted because such legislation probably would be unconstitutional.

Reinforcement of moral objections to sterilization, as a reason for recognition of the action for wrongful conception, is objectionable. A physician may always refuse to perform the operation.⁶⁵ Recognition of the action does not affect this right. Furthermore, it seems anomalous to recognize a legal claim on the theory that objections to it will thereby be strengthened.⁶⁶

60. 381 U.S. 479, 485 (1965) (finding unconstitutional a Connecticut statute forbidding dissemination of contraceptive information and devices).

61. 410 U.S. 113, 164 (1973) (finding unconstitutional a Texas statute making abortion a criminal offense).

62. See *Voe v. Califano*, 434 F. Supp. 1058, 1061 (D. Conn. 1977) (assuming that sterilization is entitled to same protection as other forms of birth control); note 19 *supra*.

63. Cf. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 689-91 (1977) (state may not restrict sale of contraceptives by forbidding any person who is not a licensed pharmacist from selling them).

In *Doe v. Temple*, 409 F. Supp. 899 (E.D. Va. 1976), the court was presented with issues relating to the constitutionality of a Virginia statute that, while not immunizing physicians from liability for performing sterilizations, did limit liability to acts of negligence in certain circumstances. See VA. CODE §§ 32-423 to -426 (Cum. Supp. 1978). The court ruled that the statute's preferential treatment for sterilizations of persons who have obtained spousal consent raised a sufficient constitutional issue for the convening of a three-judge panel. See 409 F. Supp. at 903.

64. See *Bowman v. Davis*, 48 Ohio St. 2d 41, 46, 356 N.E.2d 496, 499 (1976) (per curiam) (court declined to rule that action for wrongful conception gave rise to no damages because to do so would possibly be violation of equal protection); cf. *Doe v. Temple*, 409 F. Supp. 899, 903 (E.D. Va. 1976) (Virginia law that granted preference to physicians who performed sterilizations upon patients whose spouses consented to the operation raised constitutional issue that justified convening of three-judge panel to consider question).

65. See J. KING, *THE LAW OF MEDICAL MALPRACTICE IN A NUTSHELL* 20-21 (1977).

66. One commentator has characterized the *Sherlock* opinion as:

tak[ing] the odd position that it is socially desirable to hold the physician liable and thereby discourage physicians generally from performing contraceptive sterilizations, although the opinion recognizes that sterilization is becoming the preferred method of birth control for married persons. The court neglects to

The fallacies in some of the court's reasons for adopting the action for wrongful conception indicate that the court failed to give full consideration to the impact the constitutional right to limit or control procreation has had upon the action. Despite the common law basis behind the action, the impact of the *Griswold* and *Roe* decisions cannot be discounted, as the *Sherlock* court appeared to do. These decisions of the United States Supreme Court do not merely "seem to suggest" that the right to control procreation has a constitutional dimension.⁶⁷ *Griswold*, *Roe*, and their progeny have established that the right to control procreation is a fundamental aspect of an individual's right of privacy.⁶⁸ State interference with this right will be subject to strict scrutiny by the Court⁶⁹ and will be struck down absent a compelling state interest.⁷⁰ The

explain why the law should adopt a rule which tends to limit a popular, safe and effective method of birth control in our overpopulated age.

Clark, *Wrongful Conception: A New Kind of Medical Malpractice?*, 12 FAM. L.Q. 259, 272 n.62 (1979).

The *Sherlock* court's suggestion that wrongful conception would reinforce the opinion of those surgeons who are morally opposed to sterilization is derived from 2 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* § 19.11 (1977), in which the authors, under the caption heading "Excesses of Modern Medicine: Sterilizations," describe the operation as frequently constituting "a serious abuse of surgical license." *Id.* The authors may be correct in their suggestion that the operation should not be performed absent advice and counsel to prepare the patient for the possible psychological effects of the sterilization. *See id.* However, they appear to disregard the present attitude of the public towards sterilization and lack the insight that the *Sherlock* court possessed concerning the operation. Furthermore, the authors fail to consider the impact of the Constitution on the availability of sterilization. Their attitude toward sterilization, reflected in the caption heading to the section in which they discuss the topic, is hardly persuasive.

A more realistic approach is taken in J. KING, *supra* note 65, in which the author predicts that courts will move in the direction of the *Troppi* court. *See id.* at 222. *See also* 1 J. HORTY, *HOSPITAL LAW Patient Issues*, ch. 2, at 16 (1978) (noting that "defendants have been fortunate in not being burdened with what would likely be a sizable award of damages"). These authors suggest that the threat of a large award of damages, more than moral objections, is a major reason for physicians to refrain from performing sterilizations. In a study of Philadelphia physicians conducted circa 1964, loss of reputation and fear of liability were cited as the two factors most inhibiting doctors from undertaking sterilization operations. *See Note, supra* note 32, at 422-27. Perhaps the observations made in D. LOUISELL & H. WILLIAMS, *supra*, can be discounted as a minority view, to be respected but certainly not to form a foundation for the action for wrongful conception.

67. *See* 260 N.W.2d at 175; note 56 *supra* and accompanying text.

68. *See* cases cited note 18 *supra*. *But cf.* *Connecticut v. Menillo*, 423 U.S. 9 (1975) (*per curiam*) (state may prohibit performance of abortion by nonphysician without running afoul of constitutional guarantees).

69. *E.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

70. *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 689-91 (1977) (finding statute that forbade sale of contraceptives by any person who is not a licensed pharmacist unconstitutionally restrictive); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (finding statute making abortion a criminal offense unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding statute barring access to contraceptives unconstitutional).

action for wrongful conception has the obvious effect of protecting this fundamental right and may even be a constitutionally mandated remedy for parents whose efforts to exercise their right have been thwarted due to the negligence of another.⁷¹ It is questionable, therefore, whether a court's refusal to grant the parents relief, just as a legislature's determination to prohibit parents from exercising their right, would be constitutional.⁷²

By affording parents a common law remedy, the Minnesota Supreme Court in *Sherlock* avoided these constitutional issues, and left open the possibility of legislative intrusion into the action. Furthermore, by basing its decision to recognize the action upon an acknowledged change in public attitude toward family planning and not upon the constitutional right of privacy, the *Sherlock* court has "cast upon the sea of public opinion what the Supreme Court has declared to be a matter of strictly private concern."⁷³

One argument against awarding damages to parents of unplanned children that the majority opinion did not address was the position indicated in *Terrell*—that wrongful death cases evince a policy determination that the value of human life exceeds the costs of living. Chief Justice Sheran, dissenting in *Sherlock*, raised this objection to the majority decision.⁷⁴ The Chief Justice based his dissent on a Minnesota wrongful death case that stated: "[I]t is difficult to visualize a case where a human being does not have some monetary value in addition to [pecuniary] damages incurred by the next of kin."⁷⁵ In the case quoted by the Chief Justice, however, the Minnesota court did not hold as a matter of law that a loss would be inferred in every wrongful death case.⁷⁶ The court specifically left this issue to be dealt with by the Legislature.⁷⁷ In fact, comparing the costs of rearing a normal child to majority with the child's probable earnings during minority prompted the Minnesota court to state in one wrongful death opinion:

71. See *Troppe v. Scarf*, 31 Mich. App. 240, 253-54, 187 N.W.2d 511, 517 (because state may not infringe upon right of married persons to limit size of their families, "it may not constitutionally denigrate the right by completely denying protection provided as a matter of course to like rights"), *leave to appeal denied*, 385 Mich. 753 (1971); *Rivera v. State*, 94 Misc. 2d 157, 162, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978) ("Where a fundamental right has been violated, the law must provide a remedy."), *aff'd mem.*, ____ A.D.2d ____, 414 N.Y.S.2d 949 (1979).

72. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948) (state judicial action, even if procedurally fair, may nevertheless constitute a violation of fourteenth amendment guarantees).

73. *Rivera v. State*, 94 Misc. 2d 157, 162, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978), *aff'd mem.*, ____ A.D.2d ____, 414 N.Y.S.2d 949 (1979).

74. 260 N.W.2d at 177 (Sheran, C.J., dissenting).

75. *Id.* (quoting *Pehrson v. Kistner*, 301 Minn. 299, 303, 222 N.W.2d 334, 337 (1974)).

76. See *Pehrson v. Kistner*, 301 Minn. 299, 303, 222 N.W.2d 334, 337 (1974).

77. See *id.* ("Perhaps the more realistic approach is by legislation.").

When the cost to the parent of raising and educating the child is considered [in mitigation of damages], it is apparent that the strict adherence to the pecuniary-loss test would in many instances prevent any recovery whatever. Probable cost of raising him to maturity and educating him would be far greater than the provable value of his services.⁷⁸

Furthermore, the policy reflected in wrongful death cases is not applicable to wrongful conception actions because, as has been noted before,⁷⁹ the parents are claiming damages for the expenses of raising an unplanned child and not for the value of life over non-life. The objection based on policies inherent in wrongful life cases may be sound in actions for wrongful life, but is inapposite in actions for wrongful conception. The failure of the majority to address the issue raised by the Chief Justice's dissent therefore does not impugn the validity of the *Sherlock* decision.

The result reached in *Sherlock v. Stillwater Clinic*, whatever the faults in the underlying rationale, cannot be criticized. By deterring physicians from failing to observe ordinary standards of care when they assist persons who desire to exercise their right to control procreation, the action for wrongful conception serves a necessary purpose in an age when overpopulation is a vital concern.

III. THE NATURE OF THE ACTION

Acknowledging that public policy no longer prohibits parents from asserting a claim based on the birth of an unplanned child only begins to establish the contours of the action for wrongful conception. The scope of the action endorsed by the *Sherlock* court contains limitations derived not only from the language in the opinion itself but also from particular aspects of Minnesota law. The full development of the action for wrongful conception requires an analysis of these limitations.

A. Adoption of the Term "Wrongful Conception"

By calling the parents' claim for damages an action for "wrongful conception,"⁸⁰ the Minnesota court has attempted to achieve a more precise definition of the claim than it believed was presented by the more popular term "wrongful birth."⁸¹ The reasons given by the court

78. *Fussner v. Andert*, 261 Minn. 347, 353, 113 N.W.2d 355, 359 (1961), noted in 47 MINN. L. REV. 323 (1962).

79. See notes 39-43 *supra* and accompanying text.

80. 260 N.W.2d at 174-75.

81. *Id.* at 174-75. See generally *LaPoint v. Shirley*, 409 F. Supp. 118, 119 (W.D. Tex. 1976) (claim based on unsuccessful tubal ligation referred to as "wrongful birth" case); Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AM. J.L. & MED. 131, 132-33 (1978) (defining and distinguishing wrongful birth and wrongful life claims).

for rejecting the term "wrongful birth" also suggest limitations on the action for wrongful conception.

First, the *Sherlock* court explained that the phrase "wrongful birth" was unacceptable because it has been confused with the discredited action for wrongful life.⁸² In an action for wrongful life, an infant seeks damages for having been born in a disadvantageous condition.⁸³ The injury that the infant claims has been caused by the wrongful act of the defendant is not that the infant is suffering from a disability—either

82. 260 N.W.2d at 172 n.3. Similarly, the New York Court of Claims has noted that: the use of the term "wrongful life" in the decisions of other courts and in the media, mostly by those who oppose causes of action such as this one . . . is an unfortunate epithet, primarily because it is inaccurate as a description either of the wrong which has been committed or of the injury suffered.

Rivera v. State, 94 Misc. 2d 157, 161, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978) (claim based on unsuccessful tubal ligation), *aff'd mem.*, — A.D.2d —, 414 N.Y.S.2d 949 (1979). No better example of the confusion can be offered than a Michigan appellate court's decision in *Bushman v. Burns Clinic Medical Center, P.C.*, 83 Mich. App. 453, 268 N.W.2d 683 (1978). In *Bushman*, the parents instituted an action for "wrongful pregnancy" and claimed damages only for the costs, including mental anguish, caused by the unplanned pregnancy. *Id.* at 456-57, 268 N.W.2d at 684. Specifically, no damages were sought for the costs of rearing the unplanned child. *Id.* at 458, 268 N.W.2d at 685. On this basis, the *Bushman* court distinguished the earlier decision by another Michigan appellate court in *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511, *leave to appeal denied*, 385 Mich. 753 (1971), characterizing *Troppi* as an action for wrongful life. *See* 83 Mich. App. at 457-58, 268 N.W.2d at 685 (also noting disagreement with *Troppi* to the extent the *Bushman* decision was inconsistent). The court continued, outlining cases showing judicial disapproval of wrongful life claims, *id.* at 458-59, 268 N.W.2d at 685-86, and noting the *Sherlock* court's adoption of the action for wrongful conception. *Id.* at 459 n.2, 268 N.W.2d at 686 n.2.

83. In the leading decision, *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964), an illegitimate child brought suit against its father for having caused its birth. The decision, which one commentator has called "sensitive and insightful," Kashi, *supra* note 2, at 1419, rejected the child's claim. Although courts would later reject similar cases because of the difficulty in proving damages, *see, e.g.*, *Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978); *Stills v. Gratton*, 55 Cal. App. 3d 698, 705-06, 127 Cal. Rptr. 652, 656-57 (1976), the *Zepeda* court was concerned more with the consequences of recognition:

It is not the suits of illegitimates which give us concern, great in numbers as these may be. What does disturb us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.

41 Ill. App. 2d at 260, 190 N.E.2d at 858.

The action for wrongful life has prompted a number of commentators to speculate on theories of recovery. *See, e.g.*, Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966), *reprinted in* 7 J. FAM. L. 465 (1967); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970).

legal⁸⁴ or physical⁸⁵—but simply that the infant was born.⁸⁶ The courts have been confounded by these claims and unable to devise a measure of damages for determining the value of life over non-life.⁸⁷ The action for wrongful conception, brought by the parents to recover damages for the costs of rearing the unplanned child,⁸⁸ is therefore readily distinguishable from the action for wrongful life. By coining the phrase “wrongful conception,” the Minnesota court sought to avoid the legal and philosophical problems associated with wrongful life claims.

To emphasize that the action for wrongful conception should not be construed as an implicit recognition of the action for wrongful life, the court stated: “[T]his cause of action is exclusively that of the parents, since it is they and not the unplanned child who have sustained both

84. See *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 256-58, 190 N.E.2d 849, 856-57 (1963) (illegitimacy), *cert. denied*, 379 U.S. 945 (1964); *Slawek v. Stroh*, 62 Wis. 2d 295, 316-18, 215 N.W.2d 9, 21 (1974) (same). The *Zepeda* court recognized that legislation in Illinois, “spring[ing] from the conscience of man disturbed by the severity of the common law and the patent injustices long suffered by innocent children, damned by the sins of their parents,” had lessened the plight of illegitimates. 41 Ill. App. 2d at 257, 190 N.E.2d at 857. Minnesota has also attempted to alter the legal distinctions between the legitimate and the illegitimate. See *Unborn Child v. Evans*, 310 Minn. 197, 208-09, 245 N.W.2d 600, 607 (1976) (illegitimate child denied equal protection when its claim for proceeds of natural father’s life insurance was rejected), *noted in* 4 WM. MITCHELL L. REV. 233 (1978). These attempts, however, have not made the social stigma of illegitimacy any less of a hardship. See *Zepeda v. Zepeda*, 41 Ill. App. 2d at 258, 190 N.E.2d at 857.

85. See *Becker v. Schwartz*, 60 App. Div. 2d 587, 588, 400 N.Y.S.2d 119, 120 (1977) (Titone, J., concurring) (deformed child sought damages “on the ground that she should have been aborted”), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Park v. Chessin*, 60 A.D.2d 80, 83-84, 400 N.Y.S.2d 110, 114 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). See also *Jorgensen v. Mead Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973) (mongoloid twins born as result of mother’s use of birth control pills brought breach of warranty action); *Burleson v. Mead Johnson & Co.*, 463 F.2d 180 (5th Cir. 1972) (child born without arms or legs sued manufacturer of mother’s oral contraceptives); *Frey, The Pill and the Code*, 15 J. FAM. L. 1, 22-23 (1976).

86. See, e.g., *LaPoint v. Shirley*, 409 F. Supp. 118 (W.D. Tex. 1976) (claim on behalf of child for congenital deformity and parents’ claim for other damages dismissed); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (child filed counterclaim seeking damages for illegitimate birth in an action commenced by its natural father for judicial declaration of paternity and visitation rights).

One commentator has formulated an approach to the damages issue by indicating that the correct measure of damages is not the value of life over non-life, but life in a severely defective state over non-life. In such situations, the value of non-life may indeed outweigh the value of the defective existence. See Note, *supra* note 83, at 65-66.

87. See, e.g., *Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978) (“Upon what legal foundation is the court to determine that it is better not to have been born than to be born with deformities?”); *Gleitman v. Cosgrove*, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967) (“The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. . . . By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages.”).

88. See *Sherlock v. Stillwater Clinic*, 260 N.W.2d at 173, 175.

physical and financial injury by the physician's negligence."⁸⁹ The first limitation on the action for wrongful conception thus becomes clear: the action may be brought only by parents. This limitation is consistent with the view that the action serves to protect the parents' interest in controlling procreation.⁹⁰ Because this interest is one which the parents do not share with the unplanned child or its siblings,⁹¹ only the parents have the capacity to sue for negligent interference with their right to control procreation.

A second limitation inherent in the adoption of the term "wrongful conception" lies in the type of interference with the parents' interest in controlling procreation that will be remedied by the action. According to the *Sherlock* court, the term "wrongful birth" was imprecise because the parents' injury does not occur when the child is born. Rather, "it is at the point of conception that the injury claimed by the parents originates."⁹² Under this analysis, wrongful conception refers only to those cases involving sterilization or other preconception forms of birth control.⁹³ If negligence occurs after the child is conceived, the phrase "wrongful conception" would be inappropriate. Therefore, recognition of the action for wrongful conception by the Minnesota Supreme Court cannot be regarded as encompassing claims based on a physician's negligence in performing an abortion⁹⁴ or in failing to disclose or discover

89. *Id.* at 175; see *Bowman v. Davis*, 48 Ohio St. 2d 41, 45, 356 N.E.2d 496, 499 (1976) (suit by parents for costs of raising a child not suit for "wrongful life" because not damages for being versus non-being). See also *Stills v. Gratton*, 55 Cal. App. 3d 698, 705-06, 127 Cal. Rptr. 652, 656-57 (1976) (claim brought by normal child against physician that performed unsuccessful abortion on its mother dismissed although mother's claim recognized).

90. *Cf. Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 694-95 (E.D. Pa. 1978) (claim of parents based on hospital's negligence in testing for Tay-Sachs disease separate and distinct from claim of child afflicted with the disease).

91. 260 N.W.2d at 175 n.7 (court merely observed that "it could be argued that the siblings . . . are not entitled to sue for damages resulting from a diminution of either the family wealth or their share of parental love and affection"); see *Aronoff v. Snider*, 292 So. 2d 418, 419 (Fla. Dist. Ct. App. 1974) (court affirmed dismissal of complaint of siblings suing for the reduction of parental love and affection and wealth from one-third to one-fourth each as a result of the unplanned birth); *Cox v. Stretton*, 77 Misc. 2d 155, 158-60, 352 N.Y.S.2d 834, 839-41 (Sup. Ct. 1974) (siblings' action dismissed on ground that siblings suffered no personal injury). *But see Custodio v. Bauer*, 251 Cal. App. 2d 303, 323-24, 59 Cal. Rptr. 463, 476 (1967) (change in family status caused by birth of unplanned child that requires parents to spread "society, comfort, care, protection and support over a larger group" should be compensable if capable of economic measurement).

92. 260 N.W.2d at 175.

93. See *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) (negligent sterilization); *Kashi*, *supra* note 2, at 1410-19 (describing "wrongful conception" as claim involving negligent sterilization); *cf. Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98 (S.D.W. Va. 1971) (claim against manufacturer of birth control pill). See generally cases cited note 2 *supra*.

94. A California appellate court recognized a claim by a woman against a physician who

information that would have prompted the parents to terminate a pregnancy.⁹⁵ By choosing the term "wrongful conception" to describe the parents' claim, the court has indicated acceptance of little more than the issues presented to it in the *Sherlock* case: an action by parents of unplanned children against a physician who performed a sterilization upon one of the spouses in a negligent manner.

B. Basis of the Complaint

Various grounds for recovery have been advanced by parents in actions for wrongful conception. Although breach of contract or warranty⁹⁶

performed an unsuccessful abortion in *Stills v. Gratton*, 55 Cal. App. 3d 698, 701-03, 127 Cal. Rptr. 652, 653-55 (1976).

95. A number of courts have confronted the issue. See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 695 (E.D. Pa. 1978) (failure properly to perform or interpret genetic testing); *Smith v. United States*, 392 F. Supp. 654, 655 (N.D. Ohio 1975) (action on behalf of child alleging failure to diagnose rubella in pregnant woman dismissed; cause of birth defects not physician's fault); *Woodill v. Parke Davis & Co.*, 58 Ill. App. 3d 349, 350-51, 374 N.E.2d 683, 685 (1978) (failure to warn of risks of birth defects when pregnant woman given drug pitocin); *Howard v. Lecher*, 53 A.D.2d 420, 422, 386 N.Y.S.2d 460, 461 (1976) (failure to test for possibility of birth of child with hereditary disease), *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977); *Ziembra v. Sternberg*, 45 A.D.2d 230, 230-31, 357 N.Y.S.2d 265, 267 (1974) (failure to diagnose pregnancy); *Stewart v. Long Island College Hosp.*, 35 A.D.2d 531, 532, 313 N.Y.S.2d 502, 503 (1970) (failure to advise pregnant woman who had rubella that she might be able to obtain abortion elsewhere). The trend appears to be toward recognition. See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); *Woodill v. Parke Davis & Co.*, 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978); *Ziembra v. Sternberg*, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974). Although the *Sherlock* court did refer in a footnote to the leading case in this area, the reference probably cannot be viewed as approval of these claims. See 260 N.W.2d at 174 n.5 (citing *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975)). The *Jacobs* case involved a claim by parents of a child born with birth defects caused by the mother's having contracted rubella during pregnancy. The physician had reassured the mother that she had not had rubella. See 519 S.W.2d at 847. In holding that the parents had a claim for damages, the Texas court rejected the doctor's contention that had his advice been correct, the parents could not legally have terminated the pregnancy because abortions had not been lawful at that time. See *id.* at 847-48. In *Roe v. Wade*, 410 U.S. 113 (1973), the Texas abortion statutes were declared unconstitutional, the court observed, but the physician's liability in *Jacobs* was not based on the physician's failure to advise the parents to terminate the pregnancy but on his failure to inform the parents of the possibility of birth defects. See 519 S.W.2d at 848. The ramifications of the *Jacobs* decision are explored in Kass & Shaw, *The Risk of Birth Defects: Jacobs v. Theimer and the Parents' Right to Know*, 2 AM. J.L. & MED. 213 (1977). The Minnesota court may recognize claims involving post-conception negligence in future litigation without upsetting the *Sherlock* decision, but little guidance into such claims is afforded in the opinion.

96. See, e.g., *Bishop v. Bryne*, 265 F. Supp. 460, 463-64 (S.D.W. Va. 1967) (absence of proof that doctor gave express warranty led to dismissal of breach of warranty claim); *Depenbrok v. Kaiser Foundation Health Plan, Inc.*, 79 Cal. App. 3d 169, 170-71, 144 Cal. Rptr. 724, 725-26 (1978) (promise of particular result may give rise to action for breach of contract); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 314-16, 59 Cal. Rptr. 463, 470-71 (1967)

and misrepresentation⁹⁷ have sometimes been alleged, the most common basis for the action has been negligence.⁹⁸ To establish a claim in negligence against a physician requires proof of the existence of a duty owed by the physician to the injured party, a breach of that duty, a causal connection between the breach and the injury, and damages.⁹⁹

The physician's duty to a patient is easily established.¹⁰⁰ By agreeing to perform an operation upon a particular person, the physician has entered into a physician-patient relationship and owes that patient a duty of reasonable care.¹⁰¹ The scope of the physician's duty to the

(allegation that doctor agreed to sterilize patient sufficient to state claim for breach of contract); *Doerr v. Villate*, 74 Ill. App. 2d 332, 337-38, 220 N.E.2d 767, 769-70 (1966) (wife's action for damages based on birth of child following sterilization of husband is proper breach of contract action); *Green v. Sudakin*, 81 Mich. App. 545, 548-49, 265 N.W.2d 411, 412-13 (1978) (failure of physician to advise patient that sterilization not performed is breach of contract for which damages for mental suffering may be awarded); *Baldwin v. Sanders*, 266 S.C. 394, 396, 223 S.E.2d 602-03 (1976) (wife's claim against physician who unsuccessfully sterilized husband; action for breach of contract); *Robertson*, *supra* note 81, at 145-48; Comment, *Liability for Failure of Birth Control Methods*, 76 COLUM. L. REV. 1187, 1188-91 (1976) (discussing negligence, breach of warranty, and misrepresentation as bases of claims for wrongful conception); Note, *Remedy for the Reluctant Parent: Physician's Liability for the Post-Sterilization Conception and Birth of Unplanned Children*, 27 U. FLA. L. REV. 158, 165-67 (1974).

97. See, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 314, 59 Cal. Rptr. 463, 470 (1967) (physician's opinion on effect of sterilization is actionable if patient relied on opinion); *Coleman v. Garrison*, 327 A.2d 757, 763 (Del. Super. Ct. 1974) (in absence of proof of fraudulent intent, claim of misrepresentation would be dismissed), *aff'd*, 349 A.2d 8 (Del. 1975); Comment, *supra* note 96, at 1190-91. If the physician is a federal employee and the claim is consequently brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1976), misrepresentation would not be a proper basis for the claim. See *Herring v. Knab*, 458 F. Supp. 359, 362-63 (S.D. Ohio 1978) (claim that doctor failed to inform patient of probabilities of pregnancy following even successful tubal ligation was claim based on misrepresentation and barred under Federal Tort Claims Act's exclusion of misrepresentation claims); Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1976) (misrepresentation and other intentional torts excepted from provisions of Act).

98. See, e.g., *Bishop v. Byrne*, 265 F. Supp. 460, 463-64 (S.D.W. Va. 1967) (negligence in performing sterilization on woman); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 311-13, 59 Cal. Rptr. 463, 468-70 (1967) (failure to perform sterilization properly, failure to conduct proper post-operative tests, failure to obtain informed consent alleged); *Cox v. Stretton*, 77 Misc. 2d 155, 155, 352 N.Y.S.2d 834, 836-37 (Sup. Ct. 1974) (negligence in diagnosis, surgical procedure, and treatment); *Bowman v. Davis*, 48 Ohio St. 2d 41, 44-45, 356 N.E.2d 496, 498 (1976) (per curiam) (patients' signatures on consent form do not relieve physician from liability for negligence); *Robertson*, *supra* note 81, at 139-44 (identifying four stages in sterilization when negligence may occur: preoperative, operative, postoperative testing, and postoperative counseling); Comment, *supra* note 96, at 1187-88.

99. See J. KING, *supra* note 65, at 37; *Robertson*, *supra* note 81, at 138.

100. See *Robertson*, *supra* note 81, at 138.

101. See *id.* (noting that degree of care may be greater if physician specializes in sterilization).

patient's spouse, however, rarely has been discussed by the courts in wrongful conception cases. When both spouses have consulted with a physician on sterilization, they both become that physician's patients.¹⁰² As patients, the doctor owes both the same duty of care. When only one spouse has consulted with the physician about sterilization, however, the duty to the other spouse is less clear. The physician's duty to non-patients has been established in cases involving communicable diseases, seizures, and other situations in which an injury to a third person, especially a family member, is reasonably foreseeable.¹⁰³ By analogy, an injury to a non-patient spouse would be reasonably foreseeable in the sterilization context.¹⁰⁴ The analysis is weakened, however, when the non-patient spouse has declined to consent to the sterilization.¹⁰⁵ In this situation, the non-consenting spouse may not be permitted to assert that the physician's negligence, resulting in an unplanned birth, has caused any injury to his or her interests.¹⁰⁶ Thus, when one spouse has

102. In *Bishop v. Byrne*, 265 F. Supp. 460 (S.D.W. Va. 1967), the court noted that the parents' complaint contained "no averment that [the husband] suffered any physical injury by reason of the ineffectiveness of the operation on his wife; nor can any such inference be drawn from the facts alleged." *Id.* at 465. The *Bishop* case involved no claim by the husband for loss of the wife's consortium. The decision to retain the husband in the suit was based solely upon his having paid the delivery expenses. *See id.* at 465-66. Other courts have reached similar results. *See Baldwin v. Sanders*, 266 S.C. 394, 395-96, 223 S.E.2d 602, 602-03 (1976) (wife's claim for damages against doctor who performed vasectomy on her husband recognized because wife had provided funds for operation); *cf. Doerr v. Villate*, 74 Ill. App. 2d 332, 337-38, 220 N.E.2d 767, 770 (1966) (sterilization may give rise to action for property damage for other spouse); *Milde v. Leigh*, 75 N.D. 418, 28 N.W.2d 530 (1947) (sterilized spouse has claim for personal injuries; other spouse, for loss of consortium).

103. *See J. KING, supra note 65*, at 206-09; Hirsh, *Physician's Legal Liability to Third Parties Who are Not Patients*, 1977 MED. TRIAL TECH. Q. 388, 389-92.

104. Contract claims in two cases were successfully brought by wives of men who had been sterilized despite the contention of the doctors involved that the wives had not been parties to the sterilization contract. *See Doerr v. Villate*, 74 Ill. App. 2d 332, 337-38, 220 N.E.2d 767, 769-70 (1966); *Baldwin v. Sanders*, 266 S.C. 394, 395-96, 223 S.E.2d 602, 602-03 (1976). While these cases may be distinguished on the ground that the wives had alleged the existence of a contractual relationship between themselves and the physicians, the decisions indicate that when the sterilization concerns a married person, the spouse's interests are necessarily affected and may be the subject of separate claims.

105. According to the authors of a recent article, the consent of both spouses should be required before a sterilization can be performed on either because of the permanent effect the operation has on the couple's ability to procreate. *See Sherlock & Sherlock, Voluntary Contraceptive Sterilization: The Case for Regulation*, 1976 UTAH L. REV. 115, 129-31. The article, however, was written prior to the decision of the United States Supreme Court in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), which held that the spouse's consent could not be required as a condition to obtaining an abortion. *Id.* at 69-72. The reasoning of the article's authors appears to be seriously undercut by the *Planned Parenthood* decision, especially because the article was based primarily upon the reasoning of the lower court in the *Planned Parenthood* case.

106. If the operation fails and a child is born, it is difficult to see how the nonconsenting

failed to consent to the other spouse's sterilization, only the sterilized spouse should have standing to assert a wrongful conception claim.

Once the duty of care has been established, the patient must show that the duty has been breached.¹⁰⁷ This requires proof of the standard of care applied by the medical community in sterilization operations.¹⁰⁸ Failure to perform the operation, of course, constitutes a breach.¹⁰⁹ When the operation has been performed, however, proof of a lack of care becomes more difficult. The doctrine of *res ipsa loquitur* is probably unavailable. The doctrine permits triers of fact to infer negligence when an act results in an injury that ordinarily does not occur in the absence of negligence.¹¹⁰ In sterilization operations, however, an ascertainable

spouse, who opposed the sterilization, has suffered any injury. *But see* Note, *supra* note 32, at 437-38 (suggesting, albeit with little conviction, that nonconsenting spouse may have action for alienation of affections). A more troublesome issue for physicians may be the possibility of suit by the nonconsenting spouse for having performed the operation without his or her consent. Such a suit, however, is probably unconstitutional. *See* Murray v. Vandevander, 522 P.2d 302, 303 (Okla. 1974) (court rejected claim of husband against doctor and hospital responsible for his wife's hysterectomy because only wife's consent to operation was necessary); *cf.* Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) (spouse's consent to abortion cannot constitutionally be required because state cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising" (quoting with approval, Planned Parenthood v. Danforth, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975))); Przybyla v. Przybyla, 87 Wisc. 2d 441, 445, 275 N.W.2d 112, 115 (1978) (ex-husband's suit for intentional infliction of mental distress against ex-wife who had undergone abortion dismissed for failure to state claim because abortion did not constitute outrageous conduct under Wisconsin law's definition of mental distress).

107. *See* J. KING, *supra* note 65, at 37; Robertson, *supra* note 81, at 138.

108. *See* Robertson, *supra* note 81, at 138. The standard of care to which a physician who performs a sterilization must adhere was at issue in *Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964). Finding a dispute in the evidence on the proper standard of care in the community, the court noted that "[t]he absence of an accepted standard of practice is due partially to the fact that the operation is usually performed in the physician's office rather than a hospital." *Id.* at 248, 391 P.2d at 203. As a result of the absence of an accepted standard of care, the jury in *Ball* was permitted to determine that the physician's failure to conduct post-operative tests was not a departure from proper practice. *See id.* at 249-50, 391 P.2d at 205. In the years following *Ball*, however, accepted practice developed to the point that the failure of the doctor in *Sherlock* to conduct such tests resulted in the imposition of liability. *See* 260 N.W.2d at 171.

109. *See* West v. Underwood, 132 N.J.L. 325, 326, 40 A.2d 610, 611 (1945) (failure to sterilize raised issue of negligence); *cf.* Green v. Sudakin, 81 Mich. App. 545, 546, 265 N.W.2d 411, 412 (1978) (per curiam) (failure to inform patient that tubal ligation was not performed constituted breach of contract).

110. *See* Spannaus v. Otolaryngology Clinic, 308 Minn. 334, 337, 242 N.W.2d 594, 596 (1976) (severe neck pain following removal of vocal cord nodule); Hestbeck v. Hennepin County, 297 Minn. 419, 425-26, 212 N.W.2d 361, 365-66 (1973) (sponge left in patient during operation); Miller v. Raaen, 273 Minn. 109, 118-20, 139 N.W.2d 877, 883-84 (1966) (describing doctrine in medical malpractice context); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 39-40 (4th ed. 1971).

risk of failure exists.¹¹¹ One court has suggested that a short period of time between the date of the sterilization and the pregnancy may give rise to an inference of negligence.¹¹² Most courts, however, have recognized that the failure rate, which exists even when the operation has been properly performed, precludes application of the *res ipsa loquitur* doctrine.¹¹³ Thus, more is required of the plaintiff in a wrongful conception case than the bare showing of a sterilization and a subsequent pregnancy.

Proving that the physician was negligent in performing the operation is sometimes difficult, absent an admission of negligence by the doctor.¹¹⁴ This difficulty is due to the fact that, as the *Sherlock* court remarked, "the area operated upon is fully concealed."¹¹⁵ Furthermore, in

111. See, e.g., *Herring v. Knab*, 458 F. Supp. 359, 361-62 (S.D. Ohio 1978) (applying Maryland law) (expert testimony revealing 1.8 failures per thousand tubal ligations precluded application of doctrine of *res ipsa loquitur*); *Coleman v. Garrison*, 327 A.2d 757, 762 (Del. Super. Ct. 1974) (two percent failure rate shown), *aff'd*, 349 A.2d 8 (Del. 1975).

112. See *Vaughn v. Shelton*, 514 S.W.2d 870, 874 (Tenn. Ct. App.), *cert. denied*, 514 S.W.2d 870 (Tenn. 1974). The *Vaughn* court stated:

When we consider the evidence in the case at bar and the short period of time that elapsed after the operation when pregnancy was again found in the patient, a reasonable conclusion from that fact might be that one or both of the tubes were not closed, whether by negligence or a mere oversight and failure to carry out the implied terms of the agreement that the tubes would be closed.

514 S.W.2d at 874.

113. See *Herring v. Knab*, 458 F. Supp. 359, 361-62 (S.D. Ohio 1978) (applying Maryland law) (mere fact that tubal ligation failed did not establish physician's negligence when expert testified to known failure rate of 1.8 per thousand); *Coleman v. Garrison*, 327 A.2d 757, 762 (Del. Super. Ct. 1974) (doctrine inapplicable when injuries are possible in absence of negligence in two percent of cases), *aff'd*, 349 A.2d 8 (Del. 1975); *Lane v. Cohen*, 201 So. 2d 804 (Fla. Dist. Ct. App. 1967) (mere fact that vasectomy failed did not establish physician's fault). *But see* *Christensen v. Thornby*, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934) ("It is a matter of common knowledge that [a vasectomy] operation properly done in due course effects sterilization."); *Vaughn v. Shelton*, 514 S.W.2d 870, 874 (Tenn. Ct. App.) (short period of time between operation and pregnancy may lead to conclusion of negligence), *cert. denied*, 514 S.W.2d 870 (Tenn. 1974).

114. Evidence of negligence may be established by the statements of the physician who rendered the injury-producing medical care. See *Thorkeldson v. Nicholson*, 145 Minn. 491, 492, 175 N.W. 1008, 1008 (1920) (*per curiam*) (physician's statement that he knew decedent had been "treated wrong" admissible); MINN. R. EVID. 801(d)(2)(A) (admission by party opponent). Such statements may be obtained at trial or during discovery. See *Anderson v. Florence*, 288 Minn. 351, 358-62, 181 N.W.2d 873, 878-80 (1970) (testimony of defendant-physician may be compelled at deposition).

115. 260 N.W.2d at 171 n.1; *accord*, Note, *Sterilization and Family Planning: The Physician's Civil Liability*, 56 GEO. L.J. 976, 986 (1968). In *Bishop v. Byrne*, 265 F. Supp. 460 (S.D.W. Va. 1967), proof of alleged negligence in the performance of a woman's sterilization was found during birth by Caesarean section when it was discovered that one of her fallopian tubes was intact. See *id.* at 463. In *Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974), the defendant's negligence was discovered during the delivery of a premature child. See *id.* at 512-13. In *Garwood v. Locke*, 552 S.W.2d 892 (Tex. Civ. App. 1977), evidence of the defendant's negligence was discovered while a tubal ligation during a

the case of vasectomies, which can be performed in a doctor's office,¹¹⁶ only in a rare instance would witnesses to improper procedures be available. A lack of post-operative care is less difficult to prove. For example, the failure of a physician to conduct post-operative tests following a vasectomy may be evidence of negligence.¹¹⁷ Proper medical care appears to require the doctor to conduct numerous sperm counts to determine when sterility has been achieved.¹¹⁸ Even in a successful vasectomy, residual sperm continues to be discharged after the operation.¹¹⁹ Absent other precautions, conception could result if sexual relations were resumed during this period.¹²⁰ A claim could be based, therefore, on the physician's failure to conduct these tests or failure to conduct them properly.¹²¹ Furthermore, if a physician failed to inform the patient of the possibility of conception during this period and failed to advise the patient to use other birth control techniques, the physician could be guilty of a violation of a duty to disclose pertinent information to the patient.¹²²

The causal connection between the injury and the breach of duty usually has not been disputed.¹²³ An intervening or superseding cause, however, could insulate the physician from liability. For example, in a vasectomy, the vas deferens, the organ that is severed to effect male sterility, may regenerate, reversing the operation.¹²⁴ A physician could

subsequent hysterectomy was performed. *See id.* at 894. Absent similar unusual circumstances, however, proof that the performance of the operation was negligent would be difficult to establish.

116. *See Ball v. Mudge*, 64 Wash. 2d 247, 249, 391 P.2d 201, 203 (1964) (noting that absence of accepted standard for performance of vasectomy "is due partially to the fact that the operation is usually performed in the physician's office rather than a hospital"); Note, *supra* note 32, at 416 (vasectomies often performed in physician's office).

117. This was the successful allegation of negligence in the *Sherlock* case. *See* 260 N.W.2d at 171 & n.1.

118. *See Robertson, supra* note 81, at 142; Wolf, *supra* note 32, at 104; *cf.* Forbes, *Voluntary Sterilization of Women as a Right*, 18 DEPAUL L. REV. 560, 561 (1969) ("[C]oitus should not be performed until no sperm can be seen in the ejaculate under the microscope.").

119. *See Lombard, Vasectomy*, 10 SUFFOLK U.L. REV. 25, 33 (1975).

120. *See Robertson, supra* note 81, at 143.

121. *See id.* at 142-43.

122. *See, e.g., Coleman v. Garrison*, 327 A.2d 757, 762-63 (Del. Super. Ct. 1974) (duty to warn of probable results depends upon circumstances of case and general practice in community which must be established by expert testimony), *aff'd*, 349 A.2d 8 (Del. 1975); *Sard v. Hardy*, 281 Md. 432, 445-46, 379 A.2d 1014, 1023 (1977) (failure to inform woman of risk of pregnancy following tubal ligation may result in physician liability), *rev'g* 34 Md. App. 217, 367 A.2d 525 (1976). *See generally* Note, *Wrongful Conception: Who Pays for Bringing up Baby?*, 47 FORDHAM L. REV. 418, 423-24 (1978).

123. *Robertson, supra* note 81, at 144.

124. *See* Note, *supra* note 32, at 417, 434. Regeneration, or recanalization as it is more commonly called, is more likely to follow a vasectomy than a tubal ligation. *See id.* at 436. One commentator has suggested that negligence is more probable if pregnancy follows

assert that the pregnancy resulted from this process, known as recanalization,¹²⁵ rather than negligence. Obviously, a physician would be insulated from liability if the pregnancy was caused not by the vasectomized husband but by rape, artificial insemination, or adultery.¹²⁶ The parents' conduct may also be an intervening cause when, for example, they resume sexual relations in spite of the physician's advice to the contrary.¹²⁷ In the absence of such advice, however, a simple resumption of sexual relations by the parents would not qualify as an intervening cause. As one court explained:

The general test of whether an independent intervening act, which actively operates to produce an injury, breaks the chain of causation is the foreseeability of that act It is difficult to conceive how the very act the consequences of which the operation was designed to forestall, can be construed as unforeseeable.¹²⁸

a tubal ligation, *see id.*, but other sources indicate that negligence may not be inferred in such a case. As the court mentioned in *Depenbrok v. Kaiser Foundation*, 79 Cal. App. 3d 167, 144 Cal. Rptr. 724 (1978):

Admittedly, the "characteristic" result of a bilateral tubal ligation is sterility. The problem that gives rise to this case is that, in a certain percentage of cases, the result is not characteristic but non-characteristic. The medical evidence is that, for a variety of reasons, some involving medical negligence and some not, sterilization does not result.

Id. at 171, 144 Cal. Rptr. at 726. Recanalization is therefore not the sole reason for the failure of a tubal ligation or a vasectomy. Other natural causes could lead to fertility despite a sterilization.

125. *See Herring v. Knab*, 458 F. Supp. 359, 362 (S.D. Ohio 1978) (applying Maryland law) (expert opinion given that recanalization, not negligence in performing tubal ligation, was cause of pregnancy); *Teeters v. Currey*, 518 S.W.2d 512, 513-14 (Tenn. 1974) (doctor tendered defense of regeneration; on appeal from motion for summary judgment, court did not find this defense to be conclusive); *Ball v. Mudge*, 64 Wash. 2d 247, 249-50, 391 P.2d 201, 204 (1964) (physician's defense based on recanalization supported jury verdict in defendant's favor).

126. *See Robertson, supra* note 81, at 144-45 (prophesizing physician's defense that sterilized husband was not father of child but questioning propriety of defense in light of presumption of legitimacy). *But cf.* Note, *supra* note 32, at 434 & n.72 (anticipating that courts will be reluctant to accept defense that sterilized husband is not father because such a defense would also establish illegitimacy of the child).

127. *See Martineau v. Nelson*, 311 Minn. 92, 103, 247 N.W.2d 409, 416 (1976) ("plaintiff wife might have acted unreasonably in failing to at least attempt to persuade her husband to have a vasectomy or, in the absence of vasectomy, in failing to continue a regimen of birth control" after being informed by physician that tubal ligation may not have been successful).

128. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 316-17, 59 Cal. Rptr. 463, 472 (1967). Other courts have reached similar results. *See Bishop v. Byrne*, 265 F. Supp. 460, 463-64 (S.D.W. Va. 1967) (part played by husband of wife who had undergone unsuccessful sterilization not intervening cause of pregnancy). *See also Bowman v. Davis*, 48 Ohio St. 2d 41, 43, 356 N.E.2d 496, 498 (1976) (*per curiam*) (signature on consent form no bar to action for liability based on negligence); *Teeters v. Currey*, 518 S.W.2d 512, 513 (Tenn. 1974) (defense raised but not addressed by court).

As defenses, intervening and superseding cause therefore rarely would be available. If a physician has been negligent in performing a sterilization, a foreseeable consequence of that negligence would be the birth of an unplanned child.¹²⁹

Proving damages, such as the loss of consortium, medical expenses, as well as the costs of rearing the unplanned child, completes the parents' prima facie case. A more detailed analysis of the damage issue is contained later in this Comment.¹³⁰ At this point, it is sufficient to note that the parents must carry the burden of proving damages as an element of their claim for negligence.¹³¹

Claims other than negligence raise special problems. A claim based on a contract theory is subject to the rule that, in medical malpractice cases, a physician does not warrant a cure merely by undertaking to perform a particular treatment.¹³² An express contract guaranteeing the result of a sterilization operation must be established before a claim based on breach of contract will be successful.¹³³ In *Custodio v. Bauer*,¹³⁴ for example, a California court held that an allegation that the physician had agreed to sterilize the patient was sufficient to state a claim against the physician for breach of contract.¹³⁵ The *Custodio* court did not indicate whether its decision was based on mere semantics: it is uncertain whether the same result would have been reached if the allegation had stated that the physician had agreed to perform a sterilization operation and not to sterilize the patient. *Custodio* merely addressed the sufficiency of a complaint to state a claim and not the

129. See Robertson, *supra* note 81, at 144.

130. See notes 167-224 *infra* and accompanying text.

131. See Robertson, *supra* note 81, at 138.

132. Coleman v. Garrison, 327 A.2d 757, 762 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); see *Custodio v. Bauer*, 251 Cal. App. 2d 303, 314-16, 59 Cal. Rptr. 463, 470-71 (1967).

133. See *Herring v. Knab*, 458 F. Supp. 359, 363 (S.D. Ohio 1978) (no claim for breach of promise when statement constituted opinion or "therapeutic reassurance"); *Bishop v. Byrne*, 265 F. Supp. 460, 463 (S.D.W. Va. 1967) (breach of warranty to effect sterilization not established in absence of proof of express guarantee of success); *Clegg v. Chase*, 89 Misc. 2d 510, 511, 391 N.Y.S.2d 966, 967 (Sup. Ct. 1977) (warranty action dismissed due to failure to allege special contract).

134. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

135. The court wrote:

Reference to the allegations of the complaint permits the interpretation that plaintiffs and defendants agreed in writing that the latter would sterilize Mrs. Custodio by an operative procedure, and that she agreed to pay a reasonable fee for that service. Performance by plaintiffs, other than the wife's submitting to the operation, is not clearly alleged. Failure of performance by defendants and resulting damages are set forth. There are sufficient allegations to withstand the general demurrer, or, in any event, to warrant an opportunity to amend.

Id. at 315-16, 59 Cal. Rptr. at 471.

sufficiency of the evidence to support a verdict.¹³⁶ Presumably, stronger evidence of the physician's agreement would be necessary to sustain a verdict in favor of the parents on a breach of contract theory.¹³⁷

Misrepresentation, as the basis of an action for wrongful conception, requires, at the least, proof that the physician made a false statement of a material fact.¹³⁸ Furthermore, the defendant must have made the statement with knowledge that it was false.¹³⁹ A deceitful motive is not necessary,¹⁴⁰ however, although the court in *Christensen v. Thornby* held that the failure to allege a fraudulent purpose was the reason for dismissing the father's complaint in that case.¹⁴¹ A misrepresentation claim may be based on a false statement made by a person who is unaware that the statement was false.¹⁴² Thus, in *Custodio v. Bauer*, the allegation that the doctor told the parents that a sterilization would prevent conception was a sufficient basis for a misrepresentation claim because the doctor should have known that such a statement was not true in every case.¹⁴³

Although the theories of misrepresentation and breach of contract may have formed the basis for claims against physicians in other jurisdictions, patients in Minnesota probably should base their claims solely on a negligence theory. In a recent case, the Minnesota Supreme Court stated that the liability of professional persons under Minnesota law must be predicated on negligence.¹⁴⁴ The case concerned the liability of

136. See *id.*

137. See *Sard v. Hardy*, 281 Md. 432, 453, 379 A.2d 1014, 1027 (1977) (holding that proof of a preoperative warranty must be established by clear and convincing evidence).

138. See *Ball v. Mudge*, 64 Wash. 2d 247, 250, 391 P.2d 201, 204 (1964) (plaintiffs failed to prove doctor's advice to resume sexual relations after vasectomy was made recklessly without knowing it to be true or false; no inference would arise that man's fertility one year after operation meant that doctor gave him false advice following operation).

The basic elements of a misrepresentation claim are set forth in *Custodio v. Bauer*, 251 Cal. App. 2d 303, 313-14, 59 Cal. Rptr. 463, 470 (1967) (representation of material fact, falsity, scienter, inducement, reliance, and damage).

139. See, e.g., *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 117, 149 N.W.2d 37, 39 (1967).

140. See, e.g., *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 176 (8th Cir. 1971) (applying Minnesota law); *Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 198, 235 N.W.2d 831, 834 (1975) (misrepresentation may be based upon mistake; intent not a necessary element).

141. See 192 Minn. at 126, 255 N.W. at 622.

142. See, e.g., *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 117, 149 N.W.2d 37, 39 (1967).

143. See 251 Cal. App. 2d at 314 & nn.8 & 9, 59 Cal. Rptr. at 470 & nn.8 & 9.

144. See *City of Mounds View v. Waljarvi*, 263 N.W.2d 420, 423-25 (Minn. 1978) (rejecting theory of implied warranty as basis for imposing liability upon professional persons). But see *Martineau v. Nelson*, 311 Minn. 92, 99-100 & nn. 1 & 2, 247 N.W.2d 409, 414 & nn.1 & 2 (1976) (trial court permitted parents' wrongful conception claim to go to jury on breach of warranty theory; evidence supported finding that physician gave no warranty); *Hedin v. Minneapolis Medical & Surgical Inst.*, 62 Minn. 146, 64 N.W. 158

architects, but could easily be applied to physicians. Proof of negligence will be required in a medical malpractice action if the court extends the reasoning of this case to all professional persons. The effect of such a requirement, however, probably would not affect the action for wrongful conception. Claims based on error in a physician's advice or information could be stated under the theory of lack of informed consent, a species of negligence.¹⁴⁵

The action for wrongful conception in Minnesota is therefore more properly viewed as a tort action. In matters of proof, the action is indis-

(1895) (finding evidence sufficient to support verdict for patient based on institute's misrepresentation that patient's condition was curable by treatment at institute).

Statutes in some states achieve the same result. See *Shessel v. Gay*, 139 Ga. App. 429, 429, 228 S.E.2d 361, 361 (1976) (dismissing contract claim because of statute that limited physician's liability in sterilization cases to negligence); GA. CODE ANN. § 84-935.1 (1979) (liability of physicians for sterilization must be based on negligence); VA. CODE § 32-426 (1973) (physicians' liability for sterilization limited to negligence provided statute followed).

145. See *Robertson*, *supra* note 81, at 145 (claim based on lack of informed consent is a tort-contract hybrid); cf. *Vaughn v. Shelton*, 514 S.W.2d 870, 871 (Tenn. Ct. App.) (dictum) (claim for negligence in performing sterilization "might have been brought and designated as one for breach of contract"), *cert. denied*, 514 S.W.2d 870 (Tenn. 1970).

More importantly, however, the distinction between tort and contract claims is less crucial in Minnesota than in other jurisdictions. In other states, a contract claim would be measured by a different statute of limitations than would a tort claim. See, e.g., *Doerr v. Villate*, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966) (wife's action for breach of contract for sterilization subject to five-year period of limitations; not a personal injury claim subject to two-year period). Bringing a contract claim against a physician in those states would subject the claim to a longer statute of limitations than a tort claim. See *Bishop v. Byrne*, 265 F. Supp. 460, 466 (S.D.W. Va. 1967) (claim for tort subject to two-year limitations period; claim for breach of warranty, to five-year period); *Robertson*, *supra* note 81, at 146. The Minnesota statute of limitations, on the other hand, contains a specific section that applies to every claim, whether in tort or in contract, against physicians. See MINN. STAT. § 541.07(1) (1978); notes 147-66 *infra* and accompanying text. Framing a complaint against a physician in contract therefore would not affect the limitations period. Thus, the primary advantage for stating a claim in contract against a physician is unavailable in Minnesota.

One commentator has noted another disadvantage to bringing a contract claim against a physician—the possibility that the doctor's malpractice insurance may not provide coverage against claims based on breach of warranty. See *Robertson*, *supra* note 81, at 146.

An additional disadvantage lies in the differing measure of damages for breach of contract and negligence. See Comment, *Pregnancy After Sterilization: Causes of Action for Parent and Child*, 12 J. FAM. L. 635, 641-42 (1973). The measure of damages for breach of contract would encompass only foreseeable losses, but damages awarded for losses sustained as a result of negligence would include all damages proximately caused. See *Christianson v. Chicago, St. P., M. & O. Ry.*, 67 Minn. 94, 96-97, 69 N.W. 640, 641 (1896). The distinction, however, may not be so clear-cut. See *Wild v. Rarig*, 302 Minn. 419, 440-41, 234 N.W.2d 775, 789-90 (1975) (*per curiam*) (claims that arise out of breach of duty owed as a consequence of a particular relationship can constitute independent torts for which tort measure of damages would be applicable despite presence of contractual relationship between parties), *cert. denied*, 424 U.S. 902 (1976).

tinguishable from an ordinary medical malpractice action. As the *Sherlock* court noted, however, "the perplexing and developing nature of the law relating to damages in cases of this type" raises issues that require a different analysis than would be necessary in the ordinary medical malpractice case.¹⁴⁶ While in matters of proof, wrongful conception and medical malpractice may be comparable, wrongful conception more properly should be regarded as a special form of malpractice. This observation should not affect the basis for the wrongful conception claim. Simply stated, the action for wrongful conception requires proof that a physician agreed to perform a sterilization upon a particular person, that despite the sterilization a child was conceived, and that the failure of the sterilization can be traced to some fault of the physician. Fault can be established by proof of negligence in performing the operation, in treating the patient following the operation, or in failing to inform the patient of the risk of pregnancy following the operation.

C. Statute of Limitations

Commencement of an action for wrongful conception in Minnesota, if based upon a physician's "malpractice, error, mistake or failure to cure,"¹⁴⁷ is subject to a two-year statute of limitations.¹⁴⁸ This special medical malpractice statute is applicable to any claim against a physician regardless of whether the claim sounds in tort or in contract.¹⁴⁹ As interpreted by the Minnesota Supreme Court, the statute requires commencement of an action within two years of the date on which the patient received the treatment that caused the injury.¹⁵⁰ The period is tolled when the exact date is difficult to determine, but then only until

146. 260 N.W.2d at 171.

147. MINN. STAT. § 541.07(1) (1978).

148. *Id.* § 541.07. The portion of the statute applicable to medical malpractice provides: [T]he following actions shall be commenced within two years:

(1) For . . . all actions against physicians, surgeons, dentists, hospitals, sanatoriums, for malpractice, error, mistake or failure to cure, whether based on contract or tort

Id. All the statutes of limitations in Chapter 541 are governed by MINN. STAT. § 541.01 (1978), which states that "[a]ctions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues"

149. *See id.* § 541.07(1) (statute applies to actions "whether based on contract or tort").

150. *See Murray v. Fox*, 300 Minn. 373, 376-77, 220 N.W.2d 356, 358-59 (1974); *Plotnik v. Lewis*, 195 Minn. 130, 133, 261 N.W. 867, 868 (1935) (although general rule suspends statute until termination of relationship, where, as here, evidence conclusively establishes that malpractice must have occurred on earlier date, statute begins to run on that earlier date). *But see* *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 428, 92 N.W.2d 96, 103 (1958) (statute "suspended" until termination of doctor-patient relationship). The rule is not unique to Minnesota. *See, e.g., Anderson v. Wagner*, 61 Ill. App. 3d 822, 825-26, 378 N.E.2d 805, 808 (1978) (statute in effect at time of injury required commencement of action within four years of date of act causing injury).

the last date of treatment by the physician.¹⁵¹ Ignorance of the injury does not toll the statute.¹⁵² Only if the physician fraudulently conceals the malpractice from the patient is the period tolled until the patient discovers the injury.¹⁵³

If this traditional interpretation of the statute is followed in actions for wrongful conception, injustice may result when the unplanned child is not conceived during the two-year period. Because the exact date of the sterilization operation can be fixed with certainty, the statutory period could run before the date of either conception or discovery of the pregnancy.¹⁵⁴ The problem inherent in the Minnesota statute is illustrated by the parents' dilemma in the California case of *Custodio v. Bauer*. Trying, as the court observed, "to steer a course between the Scylla of limitations and the Charybdis of prematurity,"¹⁵⁵ the parents in *Custodio* commenced their suit prior to the birth of the child.¹⁵⁶ Parents of unplanned children in Minnesota may have no alternative but to follow the route of the *Custodios* if the Minnesota court adheres to its strict interpretation of the Minnesota statute of limitations. This could result in problems of alleging damages when the child has not been born prior to commencement of the suit. Still graver problems could result when the parents' suit is barred before the child has been conceived.

To avoid this injustice, courts in other states, such as California,¹⁵⁷ have adopted the discovery rule.¹⁵⁸ Under the discovery rule, the statute

151. See *Johnson v. Winthrop Laboratories Div.*, 291 Minn. 145, 149, 190 N.W.2d 77, 80 (1971).

152. See *id.* at 151, 190 N.W.2d at 81; *Schmucking v. Mayo*, 183 Minn. 37, 39, 235 N.W. 633, 633 (1931) ("[I]gnorance is the result of want of diligence, and the [patient] cannot take advantage of his own fault.").

153. See *Schmucking v. Mayo*, 183 Minn. 37, 39, 235 N.W. 633, 633 (1931).

154. This injustice was recognized by the Texas Supreme Court in *Hays v. Hall*, 488 S.W.2d 412 (Tex. 1972):

One who undergoes a vasectomy operation, and then after tests is told that he is sterile, cannot know that he is still fertile, if that be the case, until either his wife becomes pregnant or he is shown to be fertile by further testing. If the limitation period is measured from the date of the operation, and if the discovery of fertility, and therefore the injury, is not made until after the period of limitation has run, the result is that legal remedy is unavailable to the injured party before he can know that he is injured. A result so absurd and so unjust ought not to be possible.

Id. at 414.

155. 251 Cal. App. 2d at 322, 59 Cal. Rptr. at 476.

156. The parents filed their suit before the birth of the child apparently because they believed that the suit must be commenced within two years of the sterilization. Had they waited for the child to be born, the two-year period would have run. See *id.* at 309 n.4, 322, 59 Cal. Rptr. at 467 n.4, 476.

157. See *id.* at 309 n.4, 59 Cal. Rptr. at 467 n.4.

158. See, e.g., *Hackworth v. Hart*, 474 S.W.2d 377, 379 (Ky. 1971) (period runs from

of limitations does not begin to run until the injury is discovered or should have been discovered.¹⁵⁹ If the period is tolled pursuant to the discovery rule, parents of unplanned children would have a sufficient period of time in which to bring their action for wrongful conception. The Minnesota court, however, has disapproved of the discovery rule in ordinary medical malpractice actions,¹⁶⁰ and may adhere to that interpretation in wrongful conception cases.

The *Sherlock* opinion did not address the issue of limitations. The child was born within fifteen months of the date of the father's vasectomy and the lawsuit was timely filed.¹⁶¹ Nevertheless, the *Sherlock* opinion does suggest an approach to the issue for parents whose child is not so timely conceived. In the ordinary malpractice action, the patient's injury is sustained while in the physician's care.¹⁶² Therefore, to require the action to be commenced within two years after termination of the treatment does not seem unreasonable. In the action for wrongful conception, however, the parents' injury, according to the *Sherlock* court, does not arise until the child has been conceived.¹⁶³ Thus, the action for wrongful conception does not accrue until the moment of

discovery of fertility, usually when wife learns of pregnancy); *Hays v. Hall*, 488 S.W.2d 412, 414 (Tex. 1972) (following the *Hackworth* rule).

159. See *Bishop v. Byrne*, 265 F. Supp. 460, 466 (S.D.W. Va. 1967); *Anderson v. Wagner*, 61 Ill. App. 3d 822, 825-26, 378 N.E.2d 805, 808 (1978) (noting Illinois' discovery rule cases, but not following them due to amended version of statute). But see *Cox v. Stretton*, 77 Misc. 2d 155, 158, 352 N.Y.S.2d 834, 839 (Sup. Ct. 1974) (action based on lack of informed consent akin to assault and battery, thus not subject to discovery rule as would be "foreign object" medical malpractice cases).

160. See *Johnson v. Winthrop Laboratories Div.*, 291 Minn. 145, 148-51, 190 N.W.2d 77, 79-81 (1971); *Schmucking v. Mayo*, 183 Minn. 37, 39, 235 N.W. 633, 633 (1931) (discovery rule expressly rejected unless doctor guilty of fraud).

161. The sterilization had been performed on December 11, 1970; the date of last treatment apparently was January 23, 1971; the child was born on March 6, 1972. 260 N.W.2d at 171. The action was commenced after the birth of the child. Appellants' Brief and Appendix at 5.

162. See, e.g., *Swang v. Hauser*, 288 Minn. 306, 309, 180 N.W.2d 187, 189-90 (1970).

163. 260 N.W.2d at 175. In *Hays v. Hall*, 488 S.W.2d 412 (Tex. 1972), the court recognized that:

If the limitation period is measured from the date of the operation, and if the discovery of fertility, and therefore the injury, is not made until after the period of limitation has run, the result is that legal remedy is unavailable to the injured party before he can know that he is injured. A result so absurd and so unjust ought not to be possible.

Id. at 414; accord, *Teeters v. Currey*, 518 S.W.2d 512, 515 (Tenn. 1974) (in wrongful conception case filed three and one-half years after sterilization, court remarked that state public policy was opposed to "requiring that suit be filed when circumstances totally beyond the control of the injured party make it impossible for him to bring suit"). But see *Cox v. Stretton*, 77 Misc. 2d 155, 158, 352 N.Y.S.2d 834, 839 (Sup. Ct. 1974) (although statute does not toll until discovery under "foreign object" theory, negligent sterilization is closer to assault and battery cases where failure to discover does not extend the statute of limitations).

conception, when the statute of limitations should begin to run.

This interpretation of the statute of limitations would be consistent with the result reached in the *Sherlock* case. Furthermore, the court would not be required to reevaluate the present construction of the statute of limitations if such an interpretation were adopted, since the statute could be limited to the special circumstances of the action for wrongful conception. Moreover, the statute does not prohibit such a result. The statute merely states that actions against physicians "shall be commenced within two years."¹⁶⁴ The statute does not indicate when that two years should begin to run.¹⁶⁵ If the court determines that the date of the injury, rather than the date of the injury-producing treatment, is the crucial date, parents of unplanned children would not be deprived of a remedy.¹⁶⁶ Justice would be served by adopting this limited version of the discovery rule in the action for wrongful conception.

IV. DAMAGES

The *Sherlock* opinion is important not only because it recognized an action for wrongful conception but also because the Minnesota court considered the practical effect of its decision on the measure of damages. In other jurisdictions, recognition of the action has occurred on appeals from motions to dismiss for failure to state a claim upon which relief can be granted.¹⁶⁷ The issue of damages was not raised in these cases. In

164. MINN. STAT. § 541.07 (1978).

165. Although the period of limitations under Minnesota law does not commence until "the cause of action accrues," see *id.* § 541.01, this does not require a court to date the commencement of the period from the day on which the wrongful conduct occurred. See J. KING, *supra* note 65, at 266-67. The period can commence to run upon discovery of the injury. See *id.* at 267-68; notes 154-59 *supra* and accompanying text. Thus, the Minnesota court's strict adherence to the former rule could be abandoned without being inconsistent with the statutory language. Cf. *Teeters v. Currey*, 518 S.W.2d 512, 514-15 (Tenn. 1974) (Tennessee "accrual" statute interpreted to be consistent with discovery rule).

166. See *Kashi*, *supra* note 2, at 1413 n.16. Professor King concludes that, in the law of medical malpractice:

Ideally, what is needed is an unequivocal codification that preserves causes of action long enough for plaintiff to have a fair opportunity to discover them, yet recognizes an outside limit beyond which no actions, except perhaps for cases involving knowing concealment, will survive. A finite cut-off is probably necessary at some point in time regardless of the state of the patient's knowledge if the policy considerations underlying the statutes of limitations are to be vindicated.

J. KING, *supra* note 65, at 283.

167. Although a number of the reported decisions concerned appeals from motions to dismiss granted in favor of the physician, see, e.g., *Custodio v. Bauer*, 251 Cal. App. 2d 303, 307, 59 Cal. Rptr. 463, 465 (1967), a few have involved appeals after trial on the merits. See, e.g., *Bowman v. Davis*, 48 Ohio St. 2d 41, 43, 356 N.E.2d 496, 498 (1976) (per curiam) (jury verdict awarding damages of \$450,000 as well as \$12,500 damages for husband's loss of consortium and expenses upheld); *Ball v. Mudge*, 64 Wash. 2d 247, 250,

Sherlock, the appeal followed a trial on the merits of the parents' claim and the court was confronted with arguments on the proper measure of damages.¹⁶⁸ Attempting to balance the parents' interests with the traditional assertion that the birth of a child causes no injury, the court arrived at what can only be described as a compromise solution. The parents were permitted to recover the costs of rearing their unplanned child, but the physicians were allowed to offset recovery by the intrinsic benefits of parenthood.

A. Mitigation of Damages: Abortion and Adoption

Roughly a year prior to the *Sherlock* decision, the Minnesota Supreme Court handed down its decision in the case of *Martineau v. Nelson*.¹⁶⁹ In *Martineau*, the plaintiffs sought damages based on the physician's negligence in performing a tubal ligation.¹⁷⁰ The physician argued in defense that the parents were guilty of contributory negligence in failing to have the unplanned fetus aborted or in failing to have the unplanned child placed for adoption.¹⁷¹ The *Martineau* court rejected these arguments, stating that "[t]he policy of the law would be thwarted if [parents] were forced to make such moral and ethical choices . . . under a cloud of contributory fault."¹⁷² Nevertheless, the court declined to rule on the question of whether the parents' failure to abort or surrender the child should be considered in mitigation of damages.¹⁷³ This issue was tersely resolved by the *Sherlock* court: "It is also our view that the refusal of a mother to submit to an abortion or of the parents to give their child up for adoption should not be regarded as a failure on the part of the parents to mitigate damages."¹⁷⁴ The *Sherlock* court offered no explanation for its viewpoint. Nevertheless, its position is consistent with the spirit of the law governing the parent-child relationship.

In other cases, the Minnesota court has remarked that the state's adoption statutes constitute:

a judgment by the legislature that the best interest of a child will most likely be served if parental consent is required in all cases except abandonment and loss of custody through divorce. The correlative rights and duties inherent in the parent-child relationship are natural rights

391 P.2d 201, 202 (1964) (verdict for defendants; jury entitled to conclude that parents suffered no injury as result of child's birth).

168. See 260 N.W.2d at 171-72, 174-76.

169. 311 Minn. 92, 247 N.W.2d 409 (1976).

170. See *id.* at 93-94, 247 N.W.2d at 411.

171. See *id.* at 103-04 n.15, 247 N.W.2d at 416 n.15.

172. *Id.*

173. See *id.*

174. 260 N.W.2d at 176; accord, *Rivera v. State*, 94 Misc. 2d 157, 162-63, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978) (decision not to have abortion may not prevent recovery), *aff'd mem.*, ___ A.D.2d ___, 414 N.Y.S.2d 949 (1979).

of such fundamental importance that it is generally held that parents should not be deprived of them "except for grave and weighty reasons."¹⁷⁵

This policy would have been thwarted if the court had determined that parental rights must be surrendered in mitigation of damages in an action for wrongful conception.¹⁷⁶ Because duress is the basic ground for invalidating parental consent to adoption,¹⁷⁷ it is doubtful that consent to an adoption as a precondition to recovery in a wrongful conception case would be effective. Nor would adoption truly mitigate damages: in effect, adoption would absolve the physician of all liability for the costs of rearing the child. Because the Minnesota Supreme Court and the Minnesota Legislature have adhered to the position that the best interests of a child are served by its being raised by its natural parents,¹⁷⁸ a contrary decision would have been untenable.

Similarly, requiring the parents to terminate a pregnancy as a condition to recovery of damages also would have absolved the physician of

175. *In re Parks*, 267 Minn. 468, 474, 127 N.W.2d 548, 553 (1964) (citing *In re Adoption of Pratt*, 219 Minn. 414, 427, 18 N.W.2d 147, 154 (1945)). In *Parks*, the court reversed a lower court order granting adoption in favor of the natural father's second wife when the natural mother refused to consent to the termination of her parental rights. See *id.* at 469, 127 N.W.2d at 550.

176. See Note, *supra* note 32, at 436 (noting that upon birth, parents may feel responsible for raising child and that requiring adoption would encourage separation of parents and children). The suggestion was made in *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (1957) that the parents' claim for damages should not be recognized because "[m]any people would be willing to support this child were they given the right of custody and adoption." *Id.* at 46. This view has been criticized as "not consistent with the very stability of the family which the same court relies on to support its views of 'universal public sentiment.'" *Custodio v. Bauer*, 251 Cal. App. 2d 303, 324, 59 Cal. Rptr. 463, 477 (1967).

177. See, e.g., *In re Welfare of J.M.S.*, 268 N.W.2d 424, 428 (Minn. 1978) (consent to court order terminating parental rights may not be withdrawn absent fraud, duress, or undue influence); *In re Alsdurf*, 270 Minn. 236, 239, 133 N.W.2d 479, 481 (1965) (consent to placement of child with adoption agency invalid because of duress).

178. Perhaps this statement is best illustrated by the line of cases in Minnesota dealing with termination of parental rights. *In re Welfare of E.G.*, 268 N.W.2d 420 (Minn. 1978), concerned the request of foster parents of a 10-year-old child, who had lived with them since it had been 45 days old, to intervene in an action by the natural mother for custody of the child. The court stated:

The natural home, as noted in the statute [MINN. STAT. § 260.011(2) (1978)], is the preferred place for any child. Even when the child has been adjudged neglected and removed from his home, his ultimate return to his natural family should continue to be the goal sought. The test to be applied in any individual case, however, is what is in the best interests of the child.

Id. at 421. The court rejected the foster parents' request. See *id.* at 422. *In re Welfare of E.G.*, however, dealt with the rights of foster parents as against the natural parents. As against adoptive parents, natural parents have fewer rights. Cf. *In re Welfare of J.M.S.*, 268 N.W.2d 424, 428 (Minn. 1978) (natural parents may not upset adoption unless consent obtained by fraud, undue influence, or duress).

all liability for the costs of rearing the child. More fundamentally, however, requiring the parents to terminate the pregnancy would have been unconstitutional under decisions of the United States Supreme Court. In *Roe v. Wade*¹⁷⁹ the Court held that any attempt by the states to interfere with a woman's right to an abortion during the first trimester of pregnancy unconstitutionally infringed upon her right of privacy.¹⁸⁰ Requiring abortion in the wrongful conception context would be as much an interference with this right as a flat prohibition against abortion.¹⁸¹ Therefore, the *Sherlock* court's determination that the mother's failure to have an abortion should not be considered in mitigation of damages probably is constitutionally necessary.

Common law principles also support the court's decision. The common law rule originally did not require a person "to risk his life upon the operating table" to mitigate damages.¹⁸² The original rule has been modified, however. The present rule requires a person to submit to minor surgery, when reasonable, to reduce damages.¹⁸³ An abortion, which is as safe during the first trimester of pregnancy as is completing the full term of pregnancy,¹⁸⁴ could be such minor surgery under this rule. The controversy over abortion, however, suggests that, even if an abortion is considered medically to be minor surgery, it would not be an operation that a reasonable person would find a necessary precondition to the award of damages in a civil suit.¹⁸⁵

The *Sherlock* court's determination not to require abortion or adop-

179. 410 U.S. 113 (1973).

180. See *id.* at 152-54, 163-64.

181. See *Rivera v. State*, 94 Misc. 2d 157, 163, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978) (requiring abortion "would constitute an invasion of privacy of the grossest and most pernicious kind"), *aff'd mem.*, ___ A.D.2d ___, 414 N.Y.S.2d 949 (1979).

182. *Gibbs v. Almstrom*, 145 Minn. 35, 37, 176 N.W. 173, 174 (1920); *accord*, *Butler v. Whitman*, 193 Minn. 150, 152, 258 N.W. 165, 166 (1934). *But see* *Couture v. Novotny*, 297 Minn. 305, 312-13, 211 N.W.2d 172, 176 (1973) (reasonably prudent person standard applied; if operation not unreasonable, injured party's failure to undergo it and mitigate damages may be considered in reducing damages).

183. See *Couture v. Novotny*, 297 Minn. 305, 309-13, 211 N.W.2d 172, 174-76 (1973) (reviewing Minnesota case law).

184. See *Roe v. Wade*, 410 U.S. 113, 149 (1973).

185. See *Troppi v. Scarf*, 31 Mich. App. 240, 260, 187 N.W.2d 511, 520 (tortfeasor cannot complain that damages incurred by woman whose "emotional and mental makeup" is opposed to abortion are greater than those incurred by woman willing to abort), *leave to appeal denied*, 385 Mich. 753 (1971); *Ziemba v. Sternberg*, 45 A.D.2d 230, 233, 357 N.Y.S.2d 265, 269 (Sup. Ct. 1974) ("The right to have an abortion may not be automatically converted to an obligation to have one."); *Rivera v. State*, 94 Misc. 2d 157, 163, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978) (requiring abortion "would constitute an invasion of privacy of the grossest and most pernicious kind"), *aff'd mem.*, ___ A.D.2d ___, 414 N.Y.S.2d 949 (1979). See generally *Depenbrok v. Kaiser Foundation Health Plan, Inc.*, 79 Cal. App. 3d 167, 144 Cal. Rptr. 724 (1978) (due to medical necessity, woman terminated pregnancy after unsuccessful tubal ligation).

tion in mitigation of damages for wrongful conception is therefore consistent with well-established state policies and constitutional principles. As will later be made clear, however, this aspect of the decision appears to be inconsistent with the measure of damages adopted by the *Sherlock* court.

B. The Incidental Benefits Rule

The final award of damages for wrongful conception, while not reduced by the parents' failure to terminate the pregnancy or to surrender the child for adoption, will be affected by the *Sherlock* court's application of the incidental benefits rule to the measure of recovery. As set forth in the *Restatement (Second) of Torts*, the incidental benefits rule provides:

Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.¹⁸⁶

The purpose of the rule, according to the *Restatement*, is "primarily to restrict the injured person's recovery to the harm that he actually incurred and not to permit the tortfeasor to force a benefit on him against his will."¹⁸⁷ Traditionally, the rule has been applied in cases in which a physician has performed unrequested surgery.¹⁸⁸ For the patient to re-

186. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

187. *Id.*, Comment f. The contours of the incidental benefits rule are suggested by the reference to a Minnesota case, *Morris v. St. Paul City Ry.*, 105 Minn. 276, 117 N.W. 500 (1908), in the note following section 920 as it appeared in Tentative Draft No. 19. RESTATEMENT (SECOND) OF TORTS § 920, Note (Tent. Draft No. 19, 1973). In *Morris*, the plaintiff, a pregnant woman, was struck by a streetcar and suffered a miscarriage. The streetcar company contended that her damages should be measured by deducting from the pain and suffering caused by the miscarriage the value of the pain and suffering she was saved by not having to go through childbirth. See 105 Minn. at 279, 117 N.W. at 501-02. In essence, the streetcar company was arguing that, by losing her child prematurely, the plaintiff had obtained a benefit by physically suffering less pain from the miscarriage than she would have by childbirth. The court rejected the contention on the ground that the pain and suffering she would have sustained from a normal childbirth was "too remote, speculative, and uncertain to be taken as a basis for estimating damages. Her possible future suffering has no connection whatever with the suffering which resulted from the negligent act of the [streetcar company]." *Id.* at 281, 117 N.W. at 502. *Morris* indicates that for a defendant to have the opportunity of arguing the balance between benefit and loss, the benefit must first be a real benefit, capable of being accurately measured.

188. See RESTATEMENT (SECOND) OF TORTS § 920, Comment a, Illustrations 1-2 (1977). According to the comments following this section in Tentative Draft No. 19, the first two illustrations of the incidental benefits rule were derived in part from a Minnesota case, *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905), overruled on other grounds, *Genzel v. Halvorson*, 248 Minn. 527, 534, 80 N.W.2d 854, 859 (1957). See RESTATEMENT (SECOND)

cover for the technical tort of battery without considering the benefit to one's health caused by the unrequested surgery has been considered inequitable.¹⁸⁹ The injury and the benefit, occurring to the same interest, must be balanced under the rule.

The incidental benefits rule was first mentioned in a wrongful conception context in *Custodio v. Bauer*.¹⁹⁰ In *Custodio*, the wife had been sterilized to alleviate a bladder and kidney ailment that another pregnancy may have aggravated.¹⁹¹ The court indicated that if the pregnancy and delivery led to an improvement in her condition, the damage award would be subject to an offset for the value of the improved condition.¹⁹² Application of the rule outside this limited context was suggested in the *Custodio* opinion, but not fully analyzed.¹⁹³

OF TORTS § 920, Note (Tent. Draft No. 19, 1973). In *Mohr*, the plaintiff had agreed to an operation on her right ear, but on the day of surgery and after she had been anesthetized, the defendant determined that an operation on her left ear was necessary. 95 Minn. at 264-65, 104 N.W. at 13. The plaintiff sued, alleging that the operation, not having her consent, amounted to an assault and battery. *Id.* at 265, 104 N.W. at 13. In discussing the measure of damages, the court stated:

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Id. at 271, 104 N.W. at 16. Thus, damages for the assault upon plaintiff's ear, which she contended had "greatly impaired her hearing," *id.* at 265, 104 N.W. at 13, could be offset if the jury found that the condition of her ear had in fact been improved by the operation or that the physician had acted in good faith. See also *Maben v. Rankin*, 55 Cal. 2d 139, 144, 358 P.2d 681, 684, 10 Cal. Rptr. 353, 356 (1961) (applying rule to action for false imprisonment; damages for unlawful confinement in mental institution must be offset by benefits conferred).

189. See RESTATEMENT (SECOND) OF TORTS § 920, Comment a (1977).

190. See 251 Cal. App. 2d 303, 323, 59 Cal. Rptr. 463, 476 (1967).

191. *Id.* at 307-08, 59 Cal. Rptr. at 466.

192. *Id.* at 323, 59 Cal. Rptr. at 476.

193. The court wrote: "If the failure of the sterilization operation and the ensuing pregnancy benefitted the wife's emotional and nervous makeup, and any infirmities in her kidney and bladder organs, the defendants should be able to offset it." *Id.* (emphasis added). The same court later clarified this language in *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976). The *Stills* court explained that "the defendants may prove any offsets for benefits conferred and amounts chargeable to a plaintiff under her duty to mitigate damages." *Id.* at 709, 127 Cal. Rptr. at 659 (emphasis added). In neither case is the language strong enough to indicate acceptance of the incidental benefits rule as a general limitation on recovery. A benefit has to be proved under California law; it will not be presumed in every case, as is the implication under Michigan law, see *Troppi v. Scarf*, 31 Mich. App. 240, 255, 187 N.W.2d 511, 518 (benefit "may be weighed against all the elements of claimed damage"), *leave to appeal denied*, 385 Mich. 753 (1971), or under Minnesota law following *Sherlock*. See 260 N.W.2d at 176 (failure to instruct jury to deduct rearing costs for "value of the child's aid, comfort, and society" held reversible error). In fact, it is arguable whether by cataloguing the items of benefit that may be considered, the Minnesota court has foreclosed the possibility of a finding of no benefit.

The *Custodio* court's application of the rule in the wrongful conception context prompted a Michigan court to adopt the rule generally in cases involving the birth of an unplanned child. In *Troppi v. Scarf*,¹⁹⁴ which involved negligence in the filling of a prescription for birth control pills and not in the performance of a sterilization, the court found the incidental benefits rule "essential to the rational disposition of this case and the others that are sure to follow. The benefits rule allows flexibility in the case-by-case adjudication of the enormously varied claims which the widespread use of oral contraceptives portends."¹⁹⁵ Thus, the *Troppi* court announced that parents who claim damages arising from the birth of an unplanned child must offset recovery by the intrinsic benefits of parenthood.¹⁹⁶

The *Troppi* rule, while adopting the concept behind the *Restatement* version of the incidental benefits rule, nevertheless departs significantly from the *Restatement* version. As applied to the parents' claim for damages arising from the birth of an unplanned child, the *Troppi* rule appears to be inconsistent with the *Restatement*.

First, under the *Troppi* rule, negligent physicians, instead of being required to pay compensation for the foreseeable consequences of their negligence, are entitled to have the emotional value of the unplanned child deducted from the award of damages. A literal application of the *Restatement* rule appears to prohibit such a result because the tortfeasor is not permitted to "force a benefit" upon an injured party.¹⁹⁷ While it may be asserted that the parents were not compelled to have the child and therefore were not forced to take the benefits, the *Troppi* court, like the Minnesota court in *Sherlock*, refused to consider the parents' decision to keep their child in the determination of damages.¹⁹⁸ Thus, appli-

194. 31 Mich. App. 240, 187 N.W.2d 511, *leave to appeal denied*, 385 Mich. 753 (1971). As previously noted, see note 193 *supra*, the *Custodio* court indicated approval of a general application of the incidental benefits rule. However, its discussion of the rule is not as strongly phrased as the *Troppi* court's. Compare *Custodio v. Bauer*, 251 Cal. App. 2d 303, 323, 59 Cal. Rptr. 463, 476 (1967) with *Troppi v. Scarf*, 31 Mich. App. at 254-57, 187 N.W.2d at 517-19.

195. 31 Mich. App. at 256, 187 N.W.2d at 518.

196. See *id.* at 254-57, 187 N.W.2d at 517-19. In rejecting the *Troppi* analysis, as well as the parents' claim for damages for the costs of rearing an unplanned child, the court in *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975), remarked:

The preciousness of human life should not be held to vary with the circumstances surrounding birth. To make such a determination would, indeed, raise the unfortunate prospect of ruling, as a matter of law, that under certain circumstances a child would not be worth the trouble and expense necessary to bring him into the world.

327 A.2d at 761. The *Coleman* court's objections are equally applicable when the action has been recognized as when the action is rejected.

197. See *RESTATEMENT (SECOND) OF TORTS* § 920, Comment f (1977).

198. See 31 Mich. App. at 257-60, 187 N.W.2d at 519-20.

cation of the *Restatement* version of the incidental benefits rule to a wrongful conception case arguably would have been erroneous. The *Troppi* rule, applicable despite the obvious fact that it forces a benefit upon the reluctant parents, therefore is inconsistent with the *Restatement*.

Second, the *Restatement* rule is applicable only when the injury and the benefit occur to the same interest.¹⁹⁹ The *Troppi* court professed adherence to this requirement by stating that the injury and benefit that occur in a wrongful conception case affect the parents' "family interest."²⁰⁰ However, the *Troppi* court may have taken too broad a view of the *Restatement* rule's same-interest test. The expenses of rearing an unplanned child affect the parents' pecuniary interests²⁰¹ and should not be balanced with the intangible, emotional benefits of parenthood.²⁰²

The major problem with the incidental benefits rule is its inconsistency with the ruling that the parents' decision not to seek an abortion or to surrender their child for adoption should not be considered in determining the amount of the physician's liability. By requiring the parents to offset their recovery by the benefits they will receive from their unplanned child, the courts adopting the incidental benefits rule are necessarily permitting juries to weigh the parents' decision to keep the child in arriving at the award of damages. As a practical matter, the determination not to require abortion or adoption in mitigation of damages is undercut.

The *Troppi* court's version of the incidental benefits rule is additionally objectionable because it is to be applied against the total award of damages instead of just against the costs of rearing the unplanned child. The medical expenses, loss of consortium, and cost of the sterilization as well as the costs of rearing the child were all considered aspects of the "family interest" by the *Troppi* court and hence subject to the offset

199. Compare *Mohr v. Williams*, 95 Minn. 261, 271, 104 N.W. 12, 16 (1905) (benefit of operation on left ear when patient gave consent to operation on right ear may be considered in award of damages), *overruled on other grounds*, *Genzel v. Halvorson*, 248 Minn. 527, 534, 80 N.W.2d 854, 859 (1957) with *Morris v. St. Paul City Ry.*, 105 Minn. 276, 281, 117 N.W. 500, 502 (1908) (damages for miscarriage not sufficiently related to negligent act to be offset by probable benefit of not having to go through childbirth).

200. See 31 Mich. App. at 257, 187 N.W.2d at 519.

201. See *Custodio v. Bauer*, 251 Cal. App. 2d 303, 324, 59 Cal. Rptr. 463, 477 (1967) (purpose of action is "to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income"); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977) (costs of rearing unplanned child "are direct financial injury to the parents").

202. The comments to the *Restatement* explain that "[d]amages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife." *RESTATEMENT (SECOND) OF TORTS* § 920, Comment b (1977). The injury to the husband's marital interests cannot be balanced with the benefit to his pecuniary interests because the relationship is too strained to fit the same interest test.

for benefits.²⁰³ Under the *Troppi* rule, the parents could well leave the courtroom with no award or only a nominal award of damages.²⁰⁴

The Minnesota court unhesitatingly adopted the *Troppi* rule in the *Sherlock* decision, only pausing long enough to observe that the *Troppi* rule was derived from the *Restatement* version.²⁰⁵ One limitation was placed on the *Troppi* rule by the *Sherlock* court: only if parents claim damages for the costs of rearing an unplanned child would the rule have any bearing upon the award and then only upon the costs of rearing the child.²⁰⁶ If the parents sue only for the medical expenses, loss of consortium, and the wife's pain and suffering, the incidental benefits rule would not be applicable under the Minnesota court's approach. Although providing some form of compensation for the parents in every case, this approach is still subject to the same infirmities as the *Troppi* formulation.²⁰⁷ Additional problems with the *Sherlock* approach to dam-

203. See 31 Mich. App. at 255, 187 N.W.2d at 518 ("Since pregnancy and its attendant anxiety, incapacity, pain and suffering are inextricably related to child bearing, we do not think it would be sound to attempt to separate those segments of damage from the economic costs of an unplanned child in applying the 'same interest' rule.").

204. In *Bushman v. Burns Clinic Medical Center, P.C.*, 83 Mich. App. 454, 268 N.W.2d 683 (1978), the court held that a claim for "wrongful pregnancy," that is, a claim only for the medical expenses and other damages caused by the birth of an unplanned child without including the costs of rearing, would not be subject to the incidental benefits rule. The court explained: "To allow the defense to shield itself behind the love and affection of the plaintiffs for their healthy and lovable fifth child is less than equitable if indeed the plaintiffs' claims are in fact true." *Id.* at 463, 268 N.W.2d at 687-88. In *Bushman*, the court found that the damages which were not "child centered" were "equitably severable" from the damages for the rearing costs. See *id.* at 464, 268 N.W.2d at 688. *Bushman* probably should be read with its facts in mind. The court placed emphasis upon the mother's extreme difficulties during prior deliveries caused by her crippled physical condition. See *id.* Furthermore, the court labelled this action, in which the rearing costs had not been claimed, as one for wrongful pregnancy and distinguished it on that basis from *Troppi*. See *id.* at 459-60, 268 N.W.2d at 685-86.

205. See 260 N.W.2d at 174.

206. See 260 N.W.2d at 176 ("[W]e feel compelled to conclude that where the parents . . . choose to include [rearing costs] in their claim, . . . we will permit them to recover the reasonably foreseeable costs of rearing, subject to an offset for the value of the benefits conferred to them by the child.").

207. An additional objection to permitting the physician to claim the benefits of parenthood in the determination of the award of damages lies in the collateral source rule. Under the collateral source rule, an injured person's recovery is not diminished by benefits received from a third person. See *RESTATEMENT (SECOND) OF TORTS* § 920A(2) (1977). Thus, insurance proceeds that compensate the injured party for medical expenses or loss of wages are usually not considered in determining the scope of the tortfeasor's liability. See Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 672-79 (1962). Similarly, employment benefits cannot be considered. See *id.* at 679-86. Because the benefit received by the injured person is from a third person, the defendant is not permitted to claim the benefit.

The benefit that the physician is claiming the parents receive in a wrongful conception action, although not a monetary benefit as is usually the case in applying the collateral source rule, is the benefit to be derived from raising their child. Such a benefit does not

ages lie in its method of computing recovery, the subject of the following section. By adopting the incidental benefits rule, the *Sherlock* court was following the general trend of cases.²⁰⁸ But by failing to recognize the faults in the application of the rule to the action for wrongful conception, the Minnesota court may have achieved an inequitable result.

C. Computation of Damages Under the Sherlock Formula

The practical application of the incidental benefits rule in an action for wrongful conception in Minnesota was outlined in the *Sherlock* opinion. Under the *Sherlock* computation, damages always will consist of two separate items: the damages incident to the pregnancy, such as the medical expenses and pain and suffering caused by the pregnancy, which are not subject to reduction,²⁰⁹ and the damages incident to raising the unplanned child, which will be diminished by the incidental benefits rule.²¹⁰

Computation of the damages to be awarded for the costs of rearing the unplanned child necessitates a two-part determination. First to be determined are "the reasonably foreseeable expenses that will be incurred by the parents to maintain, support, and educate their child."²¹¹ Unless the child is born with "congenital deformities,"²¹² these expenses would be projected only through the child's minority.²¹³ This limitation

proceed directly from the physician, but rather comes from the unplanned child itself. Viewing the child as a third person giving the parents the benefit of its love and affection, the collateral source rule would prohibit the physician from having these benefits weighed in the determination of the parents' damages.

208. See, e.g., *Stills v. Gratton*, 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652, 658-59 (1976); *Troppe v. Scarf*, 31 Mich. App. 240, 254-57, 187 N.W.2d 511, 517, *leave to appeal denied*, 385 Mich. 753 (1971).

209. 260 N.W.2d at 175; see *Coleman v. Garrison*, 327 A.2d 757, 761-62 (Del. Super. Ct. 1974) (only damages incident to pregnancy allowable; no damages awarded for costs of rearing), *aff'd*, 349 A.2d 8 (Del. 1975); *Bushman v. Burns Clinic Medical Center, P.C.*, 83 Mich. App. 453, 461, 268 N.W.2d 683, 686-87 (1978) (damages incident to pregnancy recoverable; no offset for benefits required); 70 W. VA. L. REV. 242, 245 (1968) (medical expenses that are direct result of negligence should always be recoverable).

210. See 260 N.W.2d at 175-76. Because of the method chosen by the *Sherlock* court to compute damages, the court required the use of a special verdict form in all actions for wrongful conception. See *id.* at 176.

211. *Id.* at 176.

212. See 260 N.W.2d at 176 & n.11. Some birth control advocates have argued that preventing the birth of deformed children is one reason for removing the obstacles that impede access to contraceptives and sterilization. See, e.g., G. WILLIAMS, *Sterilization, in THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 74, 80-96 (1957).

213. 260 N.W.2d at 176. The court also wrote that "[s]hould the child's life expectancy for some reason be less than that of his parents, the value of the benefits conferred would necessarily be computed for the expected duration of his life." *Id.* at 176 n.12. It may be that in a situation where the child's life expectancy is less than its parents, the parents would be entitled to greater damages. See *Howard v. Lecher*, 53 A.D.2d 420, 434-37, 386 N.Y.S.2d 460, 469-71 (1976) (Margett, J., dissenting) (parents' mental suffering due to

on the parent's recovery is not unreasonable. A parent's duty to support its child is a legal obligation imposed upon the parent only during the child's minority.²¹⁴ To limit the parents' recovery to the time period in which they have a legal duty to support the child is justifiable.²¹⁵

The second determination to be made pertains to the benefits of parenthood. To be valued in this determination are "the child's aid, comfort, and society which will benefit the parents for the duration of their lives."²¹⁶ The *Sherlock* court admitted that its sole reason for valuing the benefits over the lifetime of the parents was the lack of a pecuniary benefit from the child during minority.²¹⁷ The explanation does not indicate why the court chose to include in this determination emotional as well as pecuniary benefits. Offsetting the financial losses with the financial and emotional benefits perhaps would result in the absence of any recovery for the parents. This offset of the losses and benefits would be less objectionable if the parents were seeking damages for the inconvenience raising a child brings to their lives.²¹⁸ In an action for wrongful conception, however, the parents are claiming damages for the financial losses caused by raising an unplanned child.²¹⁹ The court's formula, solely in regard to the items to be compared, is weighted against the parents.

child born with Tay-Sachs disease, terminal within first five years of life, should be compensable when doctor failed to inform parents of risk), *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

214. See *Mund v. Mund*, 252 Minn. 442, 445, 90 N.W.2d 309, 312 (1958) (parents have legal duty to care for offspring until child is old enough to care for itself); *McAllen v. McAllen*, 97 Minn. 76, 81-82, 106 N.W. 100, 102 (1906) (same).

215. Compare *McCarthy v. McCarthy*, 301 Minn. 270, 274, 222 N.W.2d 331, 334 (1974) (parents' duty to support handicapped child may extend beyond age of majority) with *LaBelle v. LaBelle*, 302 Minn. 98, 115, 223 N.W.2d 400, 410 (1974) (parents' duty to educate child ceases when child attains its majority).

216. 260 N.W.2d at 176. This determination is similar to the one followed in wrongful death cases involving a deceased minor. Compare *Palmer v. Haluplzk*, 294 F. Supp. 489, 492 (D. Minn. 1969) (applying Minnesota law) with *Sherlock v. Stillwater Clinic*, 260 N.W.2d at 176.

217. 260 N.W.2d at 176 n.12.

218. A New Jersey court has approved the award of damages for all losses resulting from negligent sterilization, "including the costs, emotional upset and the physical inconvenience of rearing a child." *Betancourt v. Gaylor*, 136 N.J. Super. 69, 77, 344 A.2d 336, 340 (Law Div. 1975). See also *Green v. Sudakin*, 81 Mich. App. 545, 548-49, 265 N.W.2d 411, 412-13 (1978) (per curiam) (damages for mental pain and suffering, usually not permitted in actions for breach of contract, available in sterilization case due to "intensely personal" nature of contract). In such a situation, reducing damages by the benefits received may be more equitable.

219. The parents' complaint for damages in the *Sherlock* case did not seek compensation for mental suffering and inconvenience caused by rearing an unplanned child. See 260 N.W.2d at 171. The expense of raising the child, outside the medical expenses, loss of consortium, and mother's pain and suffering resulting from the pregnancy, was the controversial item of damages. See *id.* at 175.

The balance is tilted further against the parents when the periods over which damages will be measured are considered. The costs of rearing the child must be ascertained solely with regard to the period of time in which the parents have a legal duty to support the child.²²⁰ The benefits, on the other hand, are to be determined based upon the life expectancy of the parents.²²¹ No rational basis exists to justify this distinction. Parents may have a legal right to the services of minor children,²²² but any benefits received from the child after it has attained majority can only be regarded as gifts.²²³ The time frame for determining the benefits should be the same as the time frame used in determining the costs of rearing the child.

Even if the *Sherlock* court's adoption of the incidental benefits rule in an action for wrongful conception is accepted, its approach to the measure of damages cannot be. If a balancing test is to be utilized, then all the detriments of having a child should be weighed against all the benefits. Should a less speculative approach be desired, the balance should be struck between purely pecuniary losses and gains. The *Sherlock* approach to the measure of damages can only reward the negligent physician and therefore is inconsistent with one of the stated purposes the action was to serve: deterring physicians from negligently performing sterilizations.²²⁴ A reformulation of the measure of damages appears to be necessary for the action for wrongful conception to serve this purpose meaningfully.

D. Some Suggested Approaches to Damages

The purpose of adopting the incidental benefits rule in actions for wrongful conception is to avoid an award of windfall damages to the parents and to prevent overburdening physicians with unlimited liability.²²⁵ Offsetting the costs of rearing a child to maturity against the

220. 260 N.W.2d at 176.

221. *Id.*

222. *See, e.g., In re Parks*, 267 Minn. 468, 474, 127 N.W.2d 548, 553 (1964) (parents had right to child's "services" at common law); *Miller v. Monsen*, 228 Minn. 400, 401, 37 N.W.2d 543, 544-45 (1949) (child has duty "to render obedience and services to the parent").

223. *See Fussner v. Andert*, 261 Minn. 347, 360-61, 113 N.W.2d 355, 363 (1961) (adult child is under no duty at common law to support its parents; duty must be based on contract or statute). *But see Sellnow v. Fahey*, 305 Minn. 375, 381-82, 233 N.W.2d 563, 568 (1975) (expectation of benefit, not legal right to benefit, determines whether services of deceased child are recoverable item of damages in action for wrongful death).

224. *See* 260 N.W.2d at 175.

225. Courts prefer to regard the rule as affording flexibility in the determination of damages. *See, e.g., Troppi v. Scarf*, 31 Mich. App. 240, 255-57, 187 N.W.2d 511, 518-19, *leave to appeal denied*, 385 Mich. 753 (1971). However, because the incidental benefits rule is a response to the objection that the birth of a child is not an injury to the parents, *see* Comment, *supra* note 96, at 1197-1200, limiting damages appears to be a necessary consequence of adopting the rule.

benefits of parenthood is seen as an equitable method by which to achieve this purpose. This method works against parents of unplanned children—the victims of the physician's negligence. A more equitable approach should be adopted.

In an effort to arrive at such an equitable solution to the issue of damages, some commentators have suggested that damages could be based upon the parents' reasons for seeking a sterilization.²²⁶ This approach would award damages to the parents whose reasons were economic and deny damages to the parents whose reasons were therapeutic.²²⁷ Because damages are based upon the foreseeability of injury, this approach attempts to inject the physicians' awareness of the purpose for which they were engaged into the computation of damages.²²⁸ This approach, however, appears to adopt a contractual liability for the physician that is inconsistent with the tort aspects of the action.²²⁹ Furthermore, when the parents' reasons are unknown or multiple, this approach would be difficult to apply.²³⁰

Another suggested approach considers the reasons for the sterilization and the socio-economic status of the parents in arriving at damages.²³¹ While this suggestion comes closest to an attempt to measure the true impact of an unplanned birth upon a particular set of parents, it falls short because it relies heavily upon a single objective criteria. The ability of parents to bear the financial burden of raising an unplanned child may be a factor in determining damages but it should not be a conclusive factor in denying recovery.

The better approach would be to determine the actual impact of the unplanned birth upon the particular parents who have commenced an action for wrongful conception. An impact-measurement approach would require the jury to consider all the facts and circumstances sur-

226. See Note, *Redressing a Blessing: The Question of Damages for Negligently Performed Sterilization Operations*, 33 U. Prrt. L. Rev. 886, 895-99 (1972); 70 W. Va. L. Rev. 242, 245-46 (1968); Note, *supra* note 115, at 992-94.

227. See, e.g., 70 W. Va. L. Rev. 242, 245-46 (1968).

228. See *id.* at 245-46 (costs of rearing could be awarded if physician aware that parents' reason for operation was to limit family size).

229. While foreseeability of injury may be a consideration in determining whether certain conduct was negligent, proximate cause, not foreseeability, is the pivotal issue in determining damages for negligence. See *Dellwo v. Pearson*, 259 Minn. 452, 453-56, 107 N.W.2d 859, 860-62 (1961) (jury instruction making foreseeability element of proximate cause reversible error). Because the action for wrongful conception is essentially a negligence action, see notes 96-131 *supra* and accompanying text, liability should be determined with regard to the losses proximately caused by the negligence and not the losses contemplated by the parties as a natural consequence of the operation. Thus, the reasons for the sterilization should not determine damages.

230. See Note, *supra* note 226, at 896-97 (author suggests judicial resolution in these situations).

231. See *id.* at 895-99.

rounding the unplanned birth: the family size and income, the parents' ages and social status, the physical condition of the child, and the emotional effects of the unplanned birth upon the parents.²³² The probable costs of rearing the child to maturity, as well as the probable benefits to be derived from the child, would become factors under this approach rather than the *sine qua non* of recovery. The incidental benefits rule attempts to achieve an equitable result by limiting parents to the actual losses sustained, but it places too great an emphasis upon emotional values that are difficult to measure. Furthermore, the incidental benefits rule requires that the parents prove the absence of benefits before recovery, as a practical matter, can be allowed. An impact-measurement approach would not require the parents to face the jury arguing that they have sustained an injury by becoming parents when they have determined to remain parents. The impact-measurement approach would further the purpose of deterring physicians from negligent conduct without offering a reward in the guise of parental benefits. Measuring the true impact of the unplanned birth upon the parents contains an inherent limitation on recovery because the parents would not be awarded damages for raising the child but for the real injury that they have sustained. As in a *Sherlock* computation of damages,²³³ strict judicial scrutiny of awards would also be available to limit recovery.

Unencumbered by the overly broad requests for the costs of rearing an unplanned child and by the inequities of the incidental benefits rule, an impact-measurement standard would provide a method to determine the true injury to the parents of unplanned children. Under this approach, the final award of damages would, in the *Sherlock* court's words, be "a mortal attempt to do justice in an imperfect world,"²³⁴ without the serious problems raised by the incidental benefits rule.

V. BEYOND *Sherlock*—THE INTERESTS OF THE UNPLANNED CHILD

The decision in *Sherlock v. Stillwater Clinic* represents a judicial acknowledgment of changing public attitudes toward child rearing. By permitting parents to sue physicians who have negligently caused the birth of an unplanned child, the Minnesota court has afforded the parents a remedy for interference with their right to limit the size of their families. With the recognition of the action for wrongful conception, the

232. The *Troppe* court believed its approach would accomplish such a result. See 31 Mich. App. at 255-57, 187 N.W.2d at 518-19. The court's emphasis upon the incidental benefits rule, however, clouds its analysis.

233. See 260 N.W.2d at 176.

234. *Id.* The court reversed and remanded the case for retrial on the issue of damages because the jury had not been instructed on the incidental benefits rule and had not been required to return a special verdict. *Id.* The case was eventually settled for \$17,000. 21 ATLA L. REP. 190 (1978).

Minnesota court has not forsaken the interests of the unplanned child.

Other courts have been concerned with the effect the parents' lawsuit may have on the unplanned child when the child discovers that it was unplanned, although one court believed that the effect would not be any greater for a child whose birth results in an action for wrongful conception than for any other unplanned child.²³⁵ The Minnesota court did not reflect upon the emotional effects the action could have on the unplanned child. Instead, the court reminded attorneys of their duty to consider the interests of all persons affected by the filing of a lawsuit.²³⁴

235. Concern for the feelings of the unplanned child prompted the Wisconsin Supreme Court to write:

Since the child involved might some day read this decision as to who is to pay for his support and upbringing, we add that we do not understand this complaint as implying any present rejection or future strain upon the parent-child relationship. Rather we see it as an endeavor on the part of clients and counsel to determine the outer limits of physician liability for failure to diagnose the fact of pregnancy.

Rieck v. Medical Protective Co., 64 Wis. 2d 514, 520, 219 N.W.2d 242, 245-46 (1974); accord, *Coleman v. Garrison*, 349 A.2d 8, 14 (Del. 1975) (citing and quoting *Rieck*; unplanned child should not consider lawsuit to be founded upon parents' rejection), *aff'g* 327 A.2d 757 (Del. Super. Ct. 1974). On the other hand, the California court, in *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), rejected the argument that an unplanned child who learned of its parents' suit should be protected from the stigma of "emotional bastardy" on the ground that such a child would suffer no greater an injury than other children whose births were unplanned. *Id.* at 324, 59 Cal. Rptr. at 477. The emotional injury sustained by an unplanned child should not be discounted, however. As one prominent psychiatrist has observed:

Nothing is more tragic, more fateful in its ultimate consequences, than the realization by a child that he was unwanted. Where one child reacts to this in later life with an acute mental illness, dozens of children . . . react to it in more subtle ways by developing self-protective barriers against the inner perception of the feeling of being unwanted. This may show itself in a determined campaign or in a provocative program of attracting attention by offensive behavior and even criminal acts. Still more seriously it may show itself as a constant fear of other people, or as a bitter prejudice against individuals or groups through deep-seated, easily evoked hatred for them.

Menninger, *Psychiatric Aspects of Contraception*, in *THERAPEUTIC ABORTION* 247, 250 (H. Rosen ed. 1954). See generally Wolf, *supra* note 32, at 109-18.

One study of Swedish children born after their mothers' applications for abortions were rejected concluded: "the very fact that a woman applies for legal abortion means that the prospective child runs a risk of having to surmount greater social and mental handicaps than its peers, even when the grounds for the application are so slight that it is refused." Forssman & Thuwe, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused*, in *ABORTION AND THE UNWANTED CHILD* 123, 143 (C. Reiterman ed. 1971). In the authors' opinion, legislation permitting therapeutic termination of pregnancy should also consider the social risks to which the unexpected child will be exposed. *Id.* Perhaps the action for wrongful conception should consider these same social risks in devising the measure of damages.

236. See 260 N.W.2d at 177 & n.16 (citing A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 which requires an attorney "to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm").

Attorneys and parents were instructed to "give serious reflection to the silent interests of the child and, in particular, the parent-child relationships that must be sustained long after legal controversies have been laid to rest."²³⁷ The steps to be taken to satisfy the court's instructions were left unstated, perhaps with the understanding that such a decision should be left to the parents with the advice of their legal counsel. Nevertheless, the court's message was clear: the unplanned child's interests should be considered before the decision to initiate an action for wrongful conception is made.

The evolution of the action for wrongful conception illustrates what Dean Prosser has observed—the tendency of the courts to grant increasing protection to family interests.²³⁸ Unsatisfactory as the *Sherlock* resolution of the damages controversy is, the decision is important as a method of enforcing perhaps the most fundamental of all family interests—the right to control procreation.

237. *Id.* at 177.

238. W. PROSSER, *supra* note 110, § 124, at 887-88 (4th ed. 1971) (statutory abolition of alienation of affections action in many states has reversed trend toward increased protection to family interests).